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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

No. 153.

DEXTER G. HITCHCOCK AND JAMES W. BYRNES, PLAINTIFFS IN ERROR,

vs.

THE CITY OF GALVESTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

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FILED OCTOBER 4, 1875.

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1 Circuit court of the United States, eastern district of Texas.

D. G. HITCHCOCK & CO.
v.
THE CITY OF GALVESTON. } Law. No. 863.

Be it remembered that in the above-entitled and numbered cause, begun in said court by Dexter G. Hitchcock and James W. Byrnes, composing the firm of D. G. Hitchcock & Co., plaintiffs, against The City of Galveston, defendant, by petition filed in the office of the clerk of said court on the 16th day of November, A. D. 1874, and in which a final judgment was rendered by said court on the 22d day of February, 1875, Hon. W'm B. Woods, judge U. S. circuit court, fifth circuit, presiding, the proceedings had and taken in said court in said cause are here set out in words and figures following, to wit:

2 *Petition.—Filed Nov'r* 16, '74.

In the circuit court of the United States in and for the eastern district of Texas, sitting at Galveston, December term, 1874.

To the honorable the judges of said court:

The petition of Dexter G. Hitchcock, resident citizen of the town of Monmouth, in the county of Warren, State of Illinois, and James W. Byrne, resident citizen of the city of New Orleans, in the parish of Orleans, State of Louisiana, complaining of the city of Galveston, respectfully represents:

That said city is in the county of Galveston, in said district, and is a body corporate and politic, duly chartered and incorporated under said name and style by the laws of the State of Texas, having a common seal as a corporation, and invested with all the powers and privileges usually granted by the laws of said State to municipal corporations, including the right and power to make contracts, to sue and be sued, and generally to do and perform every act within the purview of such corporations.

That on 28 February, 1874, in pursuance of various ordinances of said city, defendant herein, authorizing and providing therefor—the first numbered 21, and approved 19 August, 1873; the second numbered 26, and approved 21 October, 1873, being amendatory of the first; the third numbered 37, and approved 3 February, 1874—plaintiffs, as partners, under the firm style of D. G. Hitchcock & Co., made and entered into, and executed in duplicate, a contract with defendant through its proper officers and agents, C. W. Hurley, mayor of said city, and J. C. Ogle, chairman of the committee of streets and alleys of the council thereof, witnessed by C. C. Allen, its clerk, to fill, grade, tamp, roll, curb, and pave certain sidewalks of said city, upon the terms and conditions named in said contract, a copy whereof is hereto attached, marked "Exhibit A," and hereby made part hereof.

That, relying on the said contract and the good faith of defendant and its officers and agents, plaintiffs began, immediately upon the execution thereof, to make, at great expense, all the preparations necessary to its performance on their part, making extensive purchases of materials for the prosecution of the work, and thereupon, without the loss of a day, proceeded to its execution, in accordance with the specifications of the engineer, as nominated in said contract, continuing therein faithfully and industriously, with great labor and expense, for the space of forty-

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That, relying on the said contract and the good faith of defendant and its officers and agents, plaintiffs began, immediately upon the execution thereof, to make, at great expense, all the preparations necessary to its performance on their part, making extensive purchases of materials for the prosecution of the work, and thereupon, without the loss of a day, proceeded to its execution, in accordance with the specifications of the engineer, as nominated in said contract, continuing therein faithfully and industriously, with great labor and expense, for the space of forty-

six (46) days, when they were compelled by force and arms, and the full authority and power of defendant, to desist from said work and utterly abandon it, without fault on their part, but because of the wrong, violence, fraud, and breach of faith and contract perpetrated by defendant, as hereinafter more particularly described.

That plaintiffs made every exertion in their power to discharge their obligations as prescribed in said contract, and exhausted every means within their influence or control to finish the work undertaken by them, but they were powerless to achieve such results, so persistent
3 were defendant, its agents, officers, and servants, in denying them permission to go forward with the work, culminating in the adoption by defendant of a report of a committee of its council, of 20 April, 1814, declaring said contract nul' and void, and directing the mayor to notify plaintiffs of its abrogation, and to prevent the continuance of said work under it, which said report, as adopted by defendant, was notified by the mayor to plaintiffs by an order enforcing it, in the following terms:

MAYOR'S OFFICE,
Galveston, Texas, April 22, 1874.

Mess'rs D. G. HITCHCOCK & Co.,
Galveston:

GENTS: In accordance with the enclosed report of the committee on contracts, I hereby notify you that your contract for curbing, &c., is declared null and void by the council.

Re'p'u'ly,

C. W. HURLEY, *Mayor.*

(*Copy of report of special committee accompanying and attached to above letter of the mayor.*)

REPORT OF SPECIAL COMMITTEES.

Alderman Sealey, from the select committee of conference, reported the following; which was adopted:

"GALVESTON, *April 20th*, 1874.

"*To the City Council of the City of Galveston:*

"GENTLEMEN: Your committee appointed at the last regular meeting of your honorable body to confer with a committee of citizens upon the subject of contracts recently made for sidewalk improvement, having had such conference, respectfully report as follows:

"That inasmuch as there exists among the tax-payers a strong opposition to the execution of the work contemplated and provided for by the contracts lately entered into by his honor the mayor and the Hon. J. C. Ogle, chairman of the committee on streets and alleys; and as the validity of these contracts is gravely questioned, because of the fact that they were never approved by the city council, your committee, with a view of having the question of their validity settled before incurring further expenses to the city, recommend that each and all of the contracts lately entered into by his honor the mayor and the Hon. J. C. Ogle, chairman of committee on streets and alleys, be declared null and void, and that his honor the mayor be directed to notify all contractors to this effect.

"Your committee further report that, after careful inquiry and investigation, they find that the main objections on the part of the citizens to what is known as the 'Hitchcock contract,' are, that the contract-

price is much too high; that it covers too much space, more than public requirements demand, and that the grade is much higher than in fact it is.

4 "With the view of removing some or all of these objections, your committee recommend that a committee of three aldermen be appointed by his honor the mayor, whose duty it shall be to examine the streets of the city and ascertain the requirements of the citizens, and to make such recommendations as to the number and locality of streets to be improved as in their judgment is advisable, and at the same time report an estimate of the probable cost of such improvement; that this committee be directed to have an ordinance prepared to cover the proposed work, and to report their conclusions and actions to this board at their earliest convenience.

"Your committee further recommend that ordinance No. 37, approved Feb'y 3rd, 1874, be repealed; and that ordinance No. 21, approved August 19th, 1873, and amended October 21st, 1873, be amended so as to require all contracts to be ratified by the city council.

"Your committee finally report that, in their opinion, the requirements of the public loudly demand that sidewalks should be laid upon the principal streets of the city, and they earnestly urge your honorable body not to abandon the proposed improvements.

"GEO. W. SEALY, *Ch'm'n.*
"J. H. F. CHAPMAN.
"P. H. HENNESSY."

That, relying upon their said mutual covenants and promises with defendant, as contained in said contract, plaintiffs proceeded upon the execution of that instrument to make various contracts with third parties for the labor, materials, and other requisites for its performance, whereby they assumed undertakings of great magnitude, based wholly upon their expectation of defendant's purpose in good faith to discharge said contract with them, and in consequence of their engagements being rendered by defendant impossible of execution they are compelled to undergo the serious vexations and expenses of litigation, both threatened and already instituted against them, because of their said failure of performance as to said third parties, to their, plaintiffs', great damage.

That plaintiffs had procured every facility for the faithful prosecution of said contract, and but for the breaches of covenant and good faith on defendant's part, and its willful, fraudulent, and f'rcible disregard and violation thereof by and through its said several acts, and especially by reason of its formal and authoritative corporate action hereinbefore referred to, declaring the nullity of said contract, and directing through its mayor plaintiffs' abandonment thereof and cessation of work thereunder, said work would have been completed according to contract within the period of six months next succeeding said 28 February, 1874.

That said notification by defendant to plaintiffs of its pretended annulment of said contract was not extended to or received by them until

5 long after all said preparation for work had been made by plaintiffs, and said expenses incurred and obligations assumed; nor until a committee of its council, appointed by a resolution thereof, to inquire into and fully investigate said contract, long after the execution thereof, and the performance of labor thereunder, recognized the same by their report as an existing valid contract with defendant, and said report was adopted by defendant through its council, and said contract fully indorsed, approved, ratified, and confirmed as the act and deed of defend-

ant; nor until, by its officers and agents, duly authorized, said contract was repeatedly recognized, ratified, and confirmed as valid and subsisting between plaintiffs and defendant.

That, in pursuance of said contract, plaintiffs completed curbing upon certain sidewalks embraced therein and particularly numbered and described in the map hereto appended, marked "Exhibit X," (the whole of said maps being recapitulated in the exhibit marked "Y,") and tabulated in the exhibit marked "E," to the extent indicated, and according to the figures and prices named in the general statement of account or bill of particulars marked "Exhibit F," amounting to three thousand four hundred and thirty two dollars and three $\frac{75}{100}$ cents, ($3,432.03$\frac{75}{100}$.)

That they were also engaged, at the time of being compelled to desist therefrom as aforesaid, in completing the curbing of certain sidewalks embraced in said contract, and particularly numbered and described in said map, and tabulated in the exhibit marked "D," to the extent indicated, and according to the figures and prices therefor, and the credits applicable thereto named in said Exhibit F, amounting to twelve thousand one hundred and thirty-three dollars and fifty-nine $\frac{26}{100}$ cents, ($12,133.59$\frac{26}{100}$.)

That they also, in pursuance of said contract, had completed filling upon certain sidewalks embraced therein, and particularly numbered and described in said map, and tabulated in Exhibit E to the extent indicated, and according to the figures and prices named in Exhibit F, amounting to two thousand six hundred and twenty-eight, ($2,628,) making due plaintiffs in the aggregate for work done under said contract the sum of eighteen thousand one hundred and ninety-three dollars and sixty-three $\frac{01}{100}$ cents, ($18,193.63$\frac{01}{100}$,) as appears by said Exhibit F.

That, in pursuance of said contract, plaintiffs were ready and willing with tools, materials, and labor, and offered to finish the entire filling, edging, and curbing upon the sidewalks embraced therein other than the work already referred to as completed and in process of completion, at the prices named therefor in said contract, the said sidewalks so remaining untouched by plaintiffs at the date of aforesaid action of defendant being numbered and described in the map aforesaid, and tabulated in the exhibit marked "C," and the amount and nature of said work, and the profits that would have been derived therefrom by

6 plaintiffs, had they been allowed to complete their contract, appears in figures and description in said Exhibit F; the profits derivable from said unfinished filling being at the rate of sixty-five (65) cents per cubic yard, amounting to sixty thousand six hundred and seventy-six dollars and ninety-one $\frac{51}{100}$ cents, ($60,676.91$\frac{51}{100}$;) the profits derivable from said unfinished edging being at the rate of six (6) cents per lineal foot, amounting to fifteen thousand three hundred and sixty-six $\frac{48}{100}$ dollars, ($15,366$\frac{48}{100}$;) and the profits derivable from said unfinished curbing being at the rate of thirty-one $\frac{64}{100}$ cents (31$\frac{64}{100}$ c.) per square foot, amounting to fifty-one thousand nine hundred and forty-one dollars and eighteen $\frac{48}{100}$ cents, ($51,941.18$\frac{48}{100}$;) making due plaintiffs in the aggregate, for the profits they would have realized on said work, the sum of one hundred and twenty-seven thousand nine hundred and ninety dollars and fifty-seven $\frac{98}{100}$ cents, ($127,990.57$\frac{98}{100}$.)

That plaintiffs have at all times offered and been ready to do and perform every act required of them, and to discharge every obligation imposed on them by said contract, and they have in no respect been guilty of any default therein, or neglect thereof, but they say that said contract has been wilfully, wrongfully, fraudulently, and forcibly forbidden and prevented of execution and set at naught by defendant, whereby plaintiffs

have become involved in distressing, harrassing, and expensive litigation with others, as aforesaid; have lost their large investments made in good faith for the performance of said contract; have had the whole course of their business changed and disastrously broken up; have been deprived of the legitimate profits that by skill, care, and knowledge of the business they would have fairly realized from the completion of said work, as hereinbefore specified; have been refused payment for said work actually performed, as provided by said contract, and above set forth; and have in their fortune, business, and estate suffered irreparable damage.

That the general statement of account, the particular tabulated exhibits, and the map hereto appended and hereinbefore referred to, are correct and full statements and descriptions of what they purport to express, and are here specially referred to, severally and together, as parts hereof.

That although the said sum of eighteen thousand one hundred and ninety-three dollars and sixty-three $\frac{01}{100}$ cents ($18,193.63$\frac{01}{100}$) for work already actually done, and the said sum of one hundred and twenty-seven thousand nine hundred and ninety dollars and fifty-seven $\frac{99}{100}$ cents ($127,990 57$\frac{99}{100}$) for profits lost on said contract by the wrong-doing of defendant, have been long due, and said defendant has often been hereto requested, yet to pay said sums, or either of them, or any part of either of them, has the defendant heretofore wholly failed and refused, and still refuses, to plaintiffs' special damage to the said aggregate amount of one hundred and forty-six thousand one hundred and eighty-four dollars and twenty $\frac{99}{100}$ cents, ($146,184 20$\frac{99}{100}$,) and to their general damage in the further sum of fifty thousand dollars, ($50,000.)

7

Wherefore they bring their suit, and pray that defendant be served with all necessary notice and process herein, and required to make answer hereto or stand in default; that on the trial hereof the court will hear proof and award judgment for plaintiffs against defendant for their said damages, special and general, and cost of suit; and that they may have such other relief as they have the right to ask and the court jurisdiction to grant.

F. CHARLES HUME,
Counsel for Plaintiffs.

EXHIBIT A.

STATE OF TEXAS,
County of Galveston:

Know all men that this contract, made and entered into this twenty-eighth day of February, A. D. 1874, by and between the mayor of the city of Galveston and the chairman of the committee on streets and alleys, as parties of the first, and D. G. Hitchcock & Co., as parties of the second part, witnesseth:

That the said parties of the first part, in accordance with the authority vested in them by the city council of the city of Galveston, bind the corporation of the city of Galveston to pay to the said D. G. Hitchcock & Co., in the bonds of the city of Galveston styled "Galveston City bonds for sidewalk improvements," to be taken at par, the sum of one dollar and seventy-five cents ($1.75) for each and every square yard of pavement laid down by them upon the hereinafter to be designated sidewalks; the said pavement to be composed of asphalt in bulk, rolled solid to the thickness of three inches, and laid down upon the sidewalks on both sides of the following-named streets, that is to say, on both sides

of the Strand, Mechanic, and Post-office streets, each between Eighteenth and Twenty-fifth streets; on both sides of Market street, from Eighteenth to Thirty-third streets; on both sides of Nineteenth, Twentieth, Twenty-first, Twenty-second, Twenty-third, and Twenty-fourth streets, each between Strand and Post office streets; and also on the west side of Eighteenth street and on the east side of Twenty-fifth street.

Also, the same price to be paid, in the same manner, for each and every square yard of the said pavement laid down by them, the
8 said D. G. Hitchcock & Co., in the following manner and upon the following sidewalks, that is to say: the said pavement to be only six feet in width, and laid in the center of the sidewalks on both sides of Avenues B, C, and E, east from Eighteenth street to Twelfth street, and west from Twenty-fifth to Thirty-third street; and on both sides of Avenue D, from Eighteenth street to Twelfth street; and on both sides of Avenues F, G, H, I, and J, from Twelfth street to Thirty-third street; and on both sides of Twelfth, Sixteenth, Twentieth, Twenty-fourth, Twenty-eighth, and Thirty-third streets, from Avenue J (or Broadway) to the Strand, (or Avenue B.)

Provided, however, that the said D. G. Hitchcock & Co. obtain the written consent of the owners of the property fronting or abutting upon the said sidewalks to the laying down of the said pavement, which written consent or selection of said pavement shall be filed in the mayor's office with the city clerk.

The said parties of the first part also bind the corporation of the city of Galveston to pay to the said D. G. Hitchcock & Co., in the said bonds, to be taken at par, the sum of one dollar and twenty-five cents ($1.25) for each and every cubic yard of filling necessary and needed to be done upon any and all of the said sidewalks preparatory to the laying of any pavement thereon. The above price is to include and cover not only the filling, but the grading, tamping, and rolling.

The said parties of the first part also bind the corporation of the city of Galveston to pay to the said D. G. Hitchcock & Co., in the said bonds, to be taken at par, the sum of forty-five (45) cents for each and every square foot of wooden curbing, to be composed or made of three-inch red cypress, that may be needed or used in filling up and grading the said sidewalks, preparatory to the putting down of the said pavement or any other.

The said parties of the first part also bind the corporation of the city of Galveston to pay to the said D. G. Hitchcock & Co., in the said bonds, to be taken at par, the sum of nine (9) cents for each and every lineal foot of wooden curbing of one-by-six-inch flooring that may be needed and used in putting down the said six-foot pavements; that is to say, that may be used in putting any pavement upon the said sidewalks the pavement of which is to be only six feet in width.

All of the above work is to be done and executed in accordance with the specifications of the city engineer, now on file in the mayor's office, and the said engineer shall make weekly estimates of the work as it progresses, and when the amount or quantity finished or completed shall at the above price amount to the sum of five thousand dollars, then that amount in the said bonds at par shall be paid to the said D. G. Hitchcock & Co.

In consideration of all the foregoing, the said D. G. Hitchcock & Co. bind themselves to lay down and fabricate the said pavement in the manner and style above set forth and stipulated; and they also bind themselves to fill, grade, tamp, roll, and curb the said sidewalks
9 as above set forth and stipulated, and to receive in payment for

all the said work the respective prices above stated, and in "Galveston city bonds for sidewalk improvement" at par.

They further bind themselves to commence the said work within twenty days from the date hereof, and to finish the same without unnecessary delay.

Signed in duplicate.

In testimony of all which the said parties have hereunto signed their names and affixed their seals, (using scrolls for seals,) this the day and date above written, and the mayor of the city of Galveston has caused the corporate seal of the city of Galveston to be hereunto attached.

C. W. HURLEY, *Mayor.*
J. C. OGLE,
Chairman Com. Streets and Alleys.
D. G. HITCHCOCK & CO.

Attest:
C. C. ALLEN, *City Clerk.*

EXHIBIT F.

The city of Galveston to D. G. Hitchcock and Co., D'r.

GALVESTON, *April 23rd*, 1874.

WORK COMPLETED.			
To 5,985 square feet of curbing, completed, at 14½ inches deep, @ 45 c. per foot		$2,697 75	
" 1,631½ " " " " " in excess of 14½ inches deep, " " " "		734 28.75	
To the amount of curbing fully completed		3,432 03.75	
" 2,102⅘ cubic yards of filling, completed, @ $1.⅖ per y'd		2,628 00	
Total amount of work fully completed			$6,060 03.75
WORK IN PROGRESS OF COMPLETION.			
To 29,976½ square feet of curbing, in progress of completion, at 14½ inches deep, @ 45 c		$13,489 34.98	
" 4,651½ " " " " post, being the surface measurement of 3,101 posts, at 1½ feet each below the base of the curbing, at 45 c. per square foot		2,093 17.50	
		15,582 52.48	
Less 2 c. per lenial foot on 24,606 lenial feet of 14½ inches, (equivelent to 29,976½ square feet,) cost of labour necessary to complete work			
Less value of lumber removed from the line of the curbing after the contract was abrogated by the city, @ $27.⅖ per M	$496 16		
Less cost of 27,900 spikes, necessary for completion of work, at ⅘ c. each	2,762 99.10		
	189 78.12	3,448 93.22	
Total amount of work in progress of completion			12,133 59.26
Total value of work completed and in progress of completion			$18,193 63.01
PROFITS ON WORK NOT COMMENCED BECAUSE OF CITY'S PROHIBITION.			
To profits on 93,340⅕ cubic yards of filling, @ 65 c. per yard		60,676 91.50	
" " " 256,109 lenial feet of edging, " 6 c. " foot		15,366 48	
" " " 139,327½ square " " curbing, " 31.⅖ c. per foot		43,766 82.10	
" " " 25,854½ " " " posts below base of curbing, @ 31.⅖ c. per foot		8,180 36.38	
Total profits on work not commenced			$127,990 57.98
Total value of work and profits			$146,184 20.99

48 (The original petition endorsed as follows:) No. 863. Circuit court of the U. St's. D. G. Hitchcock & Co. v. The City of Galveston. Petition. Filed Nov'r 16th, 1874. C. Dart, clerk. F. Charles Hume, counsel for plaintiffs.

49 *Citation iss'd Nov. 16th, 1874.*

United States circuit court.

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

You are hereby commanded to summon the City of Galveston, if to be found in your district, to be and appear before the honorable circuit court of the United States, at the next term thereof, to be holden for the fifth judicial circuit, at the court-house thereof, in the city of Galveston, on Monday, the seventh day of December next, to answer the petition of Dexter G. Hitchcock and James W. Byrnes against said city in an action of debt and damages. Of which you will serve the said defendant with the accompanying copy of said petition.

Herein fail not, and due return of this writ make.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and the seal of the circuit court thereof, at Galveston, this 16th day of Nov'r in the year of our Lord eighteen hundred and seventy-four, and of American Independence the ninety-ninth year.

[SEAL.]

C. DART,
Clerk Eastern Dist. Texas, at Galveston.

50 *Marshal's return.*

Received this writ on the 16th day of November, 1874, and I executed the same on the same day by delivering to Charles W. Hurley, mayor of the city of Galveston, in person, a true copy of this writ, and a copy of the petition, certified by the clerk of this court.

TOM P. OCHILTREE,
U. S. Marshal E. D. T.

(Endorsed:) Issued 16th day of Nov., A. D. 1874. C. Dart, clerk U. S. court, E. D. T., Galveston. Returned and filed Nov. 17th, 1874. C. Dart, clerk.

51 *Defendant's answer.—Filed Dec. 16th, 1874.*

In the circuit court of the United States, eastern district of Texas, at Galveston.

D. G. HITCHCOCK & J. W. BYRNES, COMPOSING firm of D. G. Hitchcock & Co., plaintiffs,
v.
THE CITY OF GALVESTON, DEFENDANT. } No. 863.

And now comes the city of Galveston, defendant in the above-entitled suit, and says:

First. That this honorable court has not jurisdiction to hear or entertain this suit; because, it says, that it is not true that the said plaintiff therein, D. G. Hitchcock, was at the time of filing said suit, or is now,

a citizen of the State of Illinois, as in plaintiff's petition is alleged, but, on the contrary thereof, the said plaintiff, D. G. Hitchcock, was, at the date of the filing of said suit, and is now, a citizen of the State of Texas, and this defendant therefore pleads to and denies the jurisdiction of this honorable court in this suit, and prays judgment, &c.

Said defendant says further, that this honorable court has not
52 jurisdiction of this suit, because, it says, it is not true that the said plaintiff, Dexter G. Hitchcock, was a citizen of the State of Illinois, and the said James W. Byrnes a citizen of the State of Louisiana, at the time of the institution of this suit; but that said plaintiffs were, and each of them was, at the time of the institution of this suit, citizens of the State of Texas; and this defendant is ready to verify. Wherefore defendants pray judgment. &c.

Said defendant, the city of Galveston, not waiving its said pleas to the jurisdiction, but relying and insisting thereon, under the rule of practice pleading in this honorable court, requiring all the pleas of defendant to be filed at the same time, now says, to be heard by the court only in case the issue on said plea to the jurisdiction be against defendant.

Second. That plaintiffs' petition and the matters therein stated are not sufficient in law for said plaintiffs to have and maintain their action herein against this defendant; and this defendant demurs in law to said petition, and sets down the following among other grounds of demurrer thereto:

53 I. That it does not appear by said petition, and is not known to the court, that the city of Galveston, by its charter or by any law of Texas in that behalf, could legally make the contract which is alleged and sued on in said petition, or that the same is a legal and sufficient cause of action or suit.

II. The allegations that the defendant, The City of Galveston, possessed the powers and privileges usually granted by the laws of said State to municipal corporations, including the right and power to make contracts, do not show to the court any legal or valid authority in the contract sued on.

III. That the alleged ordinances authorizing and providing for the alleged contract between plaintiffs and defendant sued on are not shown to the court or exhibited in said petition in any sufficient manner to enable the court to judge of the said authority; and said allegations are mere legal conclusions, without any proper or sufficient facts to be pleaded or answered unto.

IV. That the allegations of the endorsement, approval, ratification, and confirmation of said contract by the defendant are without
54 any sufficient facts to be judged of by the court, or to give defendant sufficient information or notice.

V. That it does not appear by the petition that the mayor and chairman of the committee on streets and alleys, who made the said pretended contract sued on, had any legal authority to make or execute the same, or to bind the defendant thereby.

VI. That it does not appear by the petition that the plaintiffs' alleged commencement or attempt at performance of said contract was in accordance with the terms or with the initial or precedent condition thereof.

VII. That it does not appear that upon the entire contract said plaintiffs suffered any loss or damage.

VIII. That it appears by plaintiffs' petition that the alleged contract sued on was not the contract of the city of Galveston, or made by parties with legal authority to make the same.

IX. That it appears by plaintiffs' petition that said contract was not authorized or valid under any power or authority possessed by the city of Galveston.

55 X. That plaintiffs' petition does not set forth or show any legal or sufficient cause of action or suit against this defendant.

Wherefore, and for other causes of general demurrer apparent in said petition, defendant demurs thereto, as aforesaid, and says that it is not bound to further answer the same, and prays judgment, &c.

Third. The defendant also demurs specially to the several parts of the plaintiffs' petition, and says that each of them is insufficient in law, and states no facts in manner and form material or legal in the petition of the plaintiffs herein, and prays that the same severally be adjudged insufficient and stricken out, this demurrer being special and separate to each of the parts of said petition, as follows:

I. To all that part of said petition which alleges the endorsement, approval, ratification, or confirmation by the defendant, by itself or any officer or otherwise thereto authorized, of the pretended contract sued on by plaintiffs in this suit.

56 II. To all that part of said petition that alleges and sues for profits which would have been made or realized on said contract, because no facts are stated or set forth in said petition to sustain such claim, or to show that plaintiffs are entitled thereto.

Wherefore defendant prays the court that each of said parts of said petition be adjudged insufficient and stricken out, &c.

Fourth. This defendant denies each and every allegation in plaintiffs' petition, and alleges that they are untrue; and that this defendant did not undertake, contract, or promise, as plaintiffs allege, and that defendant is not guilty of any of the wrongs or injuries alleged in plaintiffs' petition; and that defendant is not indebted to plaintiffs in manner and form as alleged in their petition, or in any sum whatever.

Wherefore defendant prays judgment.

Fifth. This defendant says that plaintiffs ought not to have or maintain their suit against defendant, because it says that the city of Galveston had no lawful authority to contract debt and issue bonds

57 for sidewalk improvements in said city, or for the purposes and objects the subject of said contract in plaintiffs' petition set forth; and that said pretended and alleged contract was ultra vires on the part of said city, and unlawful on the part of said plaintiffs.

Wherefore defendant prays judgment, &c.

Sixth. This defendant says that plaintiffs ought not to have or maintain their action herein against defendant, because it says that it is not true that the alleged ordinances of the 19th August and 21st October, 1873, and 3d of February, 1874, or any other ordinances of said city, conferred upon the mayor and chairman of the committee of streets and alleys lawful authority to make the alleged contract in plaintiffs' petition sued on; and this defendant denies the same, and alleges that the contrary thereof is true. And defendant, in order to set forth and shew to the court the lawful powers of the said city council and of the

58 said mayor and chairman of the committee on streets and alleys, specially pleads the act of the legislature of the State of Texas, entitled "An act to incorporate the city of Galveston and to repeal all acts heretofore passed incorporating said city which may be in force by virtue of any existing charter," approved May 16th, 1871; which act is a public act of said legislature, of which judicial notice is taken in all courts and places, which act remains in force and is the charter and authority under which said pretended contract was made. And this

defendant also specially pleads, sets forth, and exhibits the said alleged ordinances under which the said mayor and chairman of the committee on streets and alleys attempted to make the said contract, being marked "No. 1," "No. 2," and "No. 3," and made part of this plea.

And this defendant also exhibits to the court the ordinance under which the "Galveston City bonds for sidewalk improvements," referred to in said contract sued on, and in which said contract by its terms was payable, were issued, being the only pretended authority therefor.

59 And defendant says that said bonds were not lawfully issued, and were null, void, and not an obligation of the said city of Galveston, which had no power to issue said bonds for sidewalk improvements. Said ordinance is made part of this plea, No. 4.

And this defendant says that the said contract sued on was not the lawful contract, act, or deed of the city of Galveston, and that the said mayor and chairman had no lawful power or authority to make and execute the same to bind this defendant, and that said city could not and did not lawfully delegate to them such power or authority; and this defendant expressly denies that the same was ever ratified, approved, confirmed, or in any manner rendered obligatory on this defendant.

All which defendant is ready to verify. Wherefore defendant prays judgment, &c.

Seventh. This defendant says that the plaintiffs ought not to have or maintain their action herein against this defendant, because it

60 says that the pretended contract sued on was procured and obtained by fraud on the part of said plaintiffs.

Wherefore defendant prays judgment, &c.

Eighth. This defendant says that the plaintiffs ought not to have or maintain their action herein against this defendant, because it says that the only powers or authority possessed by said mayor and chairman of the committee on streets and alleys, under the said ordinances alleged in the petition or otherwise, copies of said ordinances having been annexed to the preceding plea, number six, and now referred to as part of this plea, was to make contract or contracts for the entire work of filling up, grading, curbing, and paving the sidewalks therein specified.

That the contract entered into between plaintiffs and the said mayor and chairman of the committee on streets and alleys, and which is annexed to plaintiffs' petition, and sued on therein, if claimed to employ said plaintiffs to do the filling-up, grading, curbing, and other work on said sidewalks specified therein, absolutely and unconditionally,

61 but to leave the paving uncertain and conditional, was unauthorized, illegal, null, and void, and that under said ordinances and said contract the said defendants had no authority to do or perform any of the work or labor alleged in their petition, nor to prepare or purchase materials therefor, towards performance of said contract, without obtaining the written consent of the owners of the property fronting or abutting upon the said sidewalks to the laying down of the said pavement, and filing the same in the mayor's office with the city clerk; that no such written consent of any of the owners of fronting or abutting on said sidewalks had been so obtained or filed by plaintiffs, and all their pretended acts in the premises set forth as their cause of action in said petition were unauthorized, and in violation of the power of said mayor and chairman, and of the said contract; and any approval, ratification, or confirmation thereof by defendant is wholly denied.

Wherefore defendant prays judgment, &c.

Ninth. This defendant says that it denies specially all the alle-

62 gations of plaintiffs' petition of compliance with said contract;

and with doing work and labor, and preparing and furnishing materials in compliance therewith. On the contrary thereof, defendant alleges that the work done and materials furnished and being prepared towards the execution of said contract were in violation of the specifications thereof; were unskilful and unworkmanlike, inferior and unfit for the purpose, and in fraud of said contract, and in fraud of the city; and that plaintiffs having wholly failed to execute and carry out said contract according to its terms and intent, defendant did, as it well might, prevent the further action thereunder and put on and to the same.

W. L. MANN, *City Attorney.*
BALLINGER, JACK & MOTT,
FLOURNOY, SHERWOOD & SCOTT,
Counsel for Defendant.

Circuit court of the United States, eastern district of Texas.

J. W. Jockusch and George Sealy on oath say that they are members of the city council of Galveston, being aldermen of said city.
63 They further say that the facts set forth in the preceding pleas of the city of Galveston to the petition of D. G. Hitchcock and James W. Byrnes, number first and number sixth, are true in substance and in fact, to their, affiants', best knowledge and belief.

J. W. JOCKUSCH.
GEORGE SEALY.

Sworn to and subscribed before me Dec'r 16, '74.

C. DART,
Clerk U. S. Circ't Court E. D. T., G.

Exhibits referred to in foregoing answer.

No. 1.

An ordinance to provide for the filling up, grading, and paving of certain sidewalks, and to curb the same.

Be it ordained by the city council of the city of Galveston:

SECTION 1. That the mayor and the chairman of the committee on streets and alleys be, and they are hereby, authorized and directed to enter into and make a contract or contracts, with proper and re-
64 sponsible parties, to fill up, grade, and pave the sidewalks on both sides of the hereinafter-named streets, and to curb the same; and for this purpose they are hereby directed to advertise, for the period of thirty days, for bids or proposals to fill up, grade, pave, and curb, in part or in whole, the sidewalks herein named. The sidewalks to be improved under this ordinance shall be those on both sides of the following streets, to wit: Strand, Mechanic, and Post-office streets, each between Eighteenth and Twenty-fifth streets; also on both sides of Market street, from Eighteenth to Thirty-third street; also on both sides of Nineteenth, Twentieth, Twenty-first, Twenty-second, Twenty-third, and Twenty-fourth streets, each between Strand and Post-office streets; and also on the west side of Eighteenth and on the east side of Twenty-fifth streets each, between Strand and Post-office streets.

SEC. 2. That the said sidewalks shall be paved either with asphalt, brick, or concrete stone, made by the use of Portland cement; and the

curbing around the same shall be made of the best pressed brick laid in Portland cement.

SEC. 3. That the owners of lots or parts of lots who represent in each block a majority of the feet fronting or abutting upon any side-
65 walk of the same, which is to be paved under this ordinance, shall have the right, by application addressed to the mayor, at any time before the said bids or proposals are received, to select and designate which of the said materials they prefer and desire to be used in the construction of the pavement to be laid down on the said designated sidewalk; and if the owners of a majority of the frontage on each separate sidewalk cannot agree as to the material to be used in paving their respective sidewalks, or for any other cause fail to make the selection as provided for in this section, then in that event the mayor and the chairman of the committee on streets and alleys shall select and determine the material to be used.

SEC. 4. That where pavements have already been made, (excepting such as are made of planks or boards,) and they are found to be below the established grade, the owners or agents of the property fronting on the same shall be notified by the street superintendent to raise the same forthwith to the required height; and if not done in accordance
66 with the said notice, then in that event the mayor and chairman of the committee on streets and alleys shall cause the same to be done, by contract or otherwise, and the cost thereof shall be assessed, as hereinafter provided, against the property fronting or abutting on the said sidewalk. Where sidewalks have been planked over, or platforms of planks or boards have been made across the sidewalk, they shall be taken up and removed, and the sidewalk shall be paved as provided herein for other sidewalks. The pavement to be laid upon each sidewalk shall be uniform throughout the same; that is to say, shall be composed of the same material, except when parts of a sidewalk are already paved.

SEC. 5. That the cost of filling, raising, curbing, and paving each separate sidewalk, as soon as the same shall be finished and completed, shall be a charge against the property fronting or abutting thereon, and shall be assessed against the same in the following manner, to wit:
67 As soon as such sidewalk in each separate block is finished and completed, the city engineer shall make out in a book regularly prepared for the purpose a full list of all lots or fractional lots fronting or abutting on the same, giving the number of each and the frontage of each on the sidewalk, the number of the block in which situated, and the names of the owners thereof, if known, and if not known, then the said lots or fractional lots shall be entered upon the said book as unknown. The said officer shall then enter or place in the said book, opposite each lot or fractional lot, its proper or pro-rata portion of the cost of the filling, raising, curbing, and paving, and shall exhibit his said list, so made out and signed by him, to the city council at its next regular meeting after the said list is made out and finished; and upon the approval and acceptance of the same by the city council, the amount placed on the said
68 list opposite each lot or fractional lot shall be an assessment against the same, and each assessment so made shall date back to the time or date upon which the improvement of its respective sidewalk was finished and completed, and the same shall be, until paid, a lien upon the property against which it is levied. After the approval and acceptance of the said list by the city council, it shall be signed by the mayor and countersigned by the city clerk, and placed in the hands of the city collector for collection.

SEC. 6. That the said assessment shall be paid in five annual installments, and they shall draw interest from date of assessment until paid, at the rate of 10 per cent. per annum. The first installment shall be due and payable immediately after the completion of the sidewalk upon which the property charged fronts or abuts; and an installment equal thereto shall become due and payable annually thereafter until the whole cost is paid.

69 SEC. 7. That article 348, (XV,) 350, (XVII,) 358, (VI,) and 377, (II,) of the revised ordinances of the city of Galveston, and the ordinance approved January 13, 1873, and entitled "An ordinance prohibiting the building or erection of any sidewalk or platform in the fire limits unless composed of brick, shell, asphaltum, or blocks of wood," in so far as they conflict with this ordinance, be, and they are hereby, repealed.

SEC. 11. That this ordinance shall take effect and be in force from and after its passage.

Approved August 19, 1873.

C. W. HURLEY, *Mayor.*

Attest:

C. C. ALLEN, *City Clerk.*

No. 2.

An ordinance to amend an ordinance entitled "An ordinance (No. 21) to provide for the filling-up, grading, and paving of certain sidewalks, and to curb the same." Approved August 19, 1873.

70 SEC. 1. Be it ordained by the city council of the city of Galveston, That the second section of the foregoing-named ordinance be, and the same is hereby, amended so as to read as follows, to wit:

SEC. 2. That the said sidewalk shall be paved with either of the following-named materials, viz: Asphalt, hard bricks laid in a bed of Portland cement and properly grouted, concrete made of Portland cement mixed with other proper materials, or with tile or stone laid in a bed of Portland cement; and the curbing around the same shall be made of the best hard brick laid in Portland cement and capped with a plank of heart-pine three inches in thickness and twelve inches wide, properly fastened to the curbing with the necessary iron bolts.

SEC. 2. Be it further ordained, That the third section to the foregoing ordinance be, and the same is hereby, amended by the addition of the following to the last end of said section: "Provided, That it is herein made the duty of the street superintendent to serve written notice

71 on all property-owners or their authorized agents whose sidewalks may not be of proper material and in conformity with grade, to construct the same within a period of sixty days after notice in the manner and with one or the other of the materials named in the first section to this amendment; and any fault or failure to comply with the requirements of such notice shall then authorize the mayor and the chairman of the committee on streets and alleys to proceed to have constructed the sidewalks in front of the property of any defaulting property owner or owners, as provided in the ordinance to which this is an amendment."

SEC. 3. Be it further ordained, That this ordinance go into effect from and after its passage.

Ap'roved October 21st, 1873.

C. W. HURLEY, *Mayor.*

Attest:

C. C. ALLEN, *City Clerk.*

72 No. 3.

An ordinance to provide for the filling-up, grading, curbing, and paving of certain sidewalks.

Be it ordained by the city council of the city of Galveston:

SECTION 1. That the sidewalks on both sides of the hereinafter-to-be-named streets shall be filled up, graded, curbed, and paved in the following manner, that is to say: the said sidewalks shall be filled up or raised to the grade established by the city engineer, and curbed with cypress-wood, stone, or brick, and a pavement six feet in width laid in the centre of the same; the said pavement to be composed of either asphalt, hard brick laid in Portland cement and grouted, concrete made of Portland cement and other proper materials, tiles, or stone.

SEC. 2. That the sidewalks so to be improved shall be those on both sides of Avenues B, C, and E, east from Eighteenth street to Twelfth street, and west from Twenty-fifth to Thirty-third streets; and on
73 both sides of Avenue D from Eighteenth street to Twelfth street; and on both sides of Avenues F, G, H, I, & J, from Twelfth street to Thirty-third street; and on both sides of Twelfth, Sixteenth, Twentieth, Twenty-fourth, Twenty-eighth, and Thirty-third, from Avenue J (or Broadway) to Avenue B, (or Strand.)

SEC. 3. That the mayor and chairman of the committee on streets and alleys be, and they are hereby, authorized and directed to enter into and make contract or contracts with proper and responsible parties to fill up, grade, curb, and pave the said sidewalks.

SEC. 4. That the cost of filling, raising, curbing, and paving each separate sidewalk, as soon as the same shall be finished and completed, shall be a charge against the property fronting and abutting thereon, and shall be assessed against the same in the following manner, to wit:

As soon as each sidewalk in each separate block is finished and completed, the city engineer shall make out in a book, regularly pre-
74 pared for the purpose, a full list of all lots or fractional lots fronting or abutting on the same, giving the number of each, and the frontage of each on the sidewalk, the number of the block in which situated, and the names of the owners thereof, if known, and if not known, then the said lots or fractional lots shall be entered upon the said book as unknown.

The said officer shall then enter or place in the said book opposite each lot or fractional lot its proper or pro rata portion of the cost of the filling, raising, curbing, and paving, and shall exhibit his said list, so made out and signed by him, to the city council at its next regular meeting after the said list is made out and finished, and upon the approval and acceptance of the same by the city council, the amount placed on the said list opposite *opposite* each lot or fractional lot shall be an assessment against the same, and each assessment so made shall date back to the time or date upon which the improvement of its
75 respective sidewalk was finished and completed, and the same shall be, until paid, a lien upon the property against which it is levied.

After the approval and acceptance of the said list by the city council, it shall be signed by the mayor and countersigned by the city clerk, and placed in the hands of the city collector for collection: provided, however, that the city engineer shall not charge for making surveys of sidewalks under this ordinance.

SEC. 5. That the said assessment shall be paid in ten annual installments, and they shall dray interest from date of assessment until paid

at the rate of ten per cent. per annum. The first installment shall be due and payable immediately after the completion of the sidewalk upon which the property charged fronts or abuts, and an installment equal thereto shall become due and payable annually thereafter until the whole cost is paid.

SEC. 6. That this ordinance shall be in force and take effect from and after its passage.

Approved February 3, 1874.

76 C. W. HURLEY, *Mayor.*

Attest:

C. C. ALLEN, *City Clerk.*

No. 4.

An ordinance authorizing the issuance and sale of two hundred and fifty thousand dollars of the bonds of the city of Galveston, for the purpose of improving sidewalks, by filling, raising, paving, and curbing the same.

Be it ordained by the city council of the city of Galveston:

SECTION 1. That the mayor of the city of Galveston be, and he is, authorized to have printed or engraved coupon-bonds of the city of Galveston, to the extent of two hundred and fifty thousand dollars, to be styled "Galveston city bonds for sidewalks improvement," and to draw interest from date of their sale or disposition, at the rate of ten per cent. per annum till paid. The interest on said bonds shall be paid
77 semi-annually on the first day of March and September of each year, at the office of the city treasurer, and this shall be so expressed by coupons attached thereto. The principal of said bonds, when due or redeemable, as hereinafter provided, shall also be paid at the office of the treasurer of the city of Galveston.

SEC. 2. That the bonds hereby and herein authorized to be issued and sold shall bear the date respectively of the day upon which they are sold or disposed of, and they shall be due or payable fifteen years from their date: provided, however, that the city council shall have the right, and such right is herein and hereby expressly reserved and retained, to redeem at par any and all of the said bonds at any time after five years from their sale or disposition.

SEC. 3. That the city council, when it shall determine to redeem any of the said bonds, as provided for in the preceding section, shall instruct the city treasurer to give notice for twenty consecutive days, by publication in the official journal of the city of Galveston, that at the
78 next succeeding day or period (after the notice) provided herein for the payment of the semi-annually-maturing coupons attached to said bonds, he will redeem the bonds described in the said notice; and the said bonds shall be redeemed in the order of their issuance; that is to say, those first issued or bearing the oldest date shall be redeemed first, and they shall be particularly described by number, date, and amount in the said notice.

SEC. 4. That the holders or owners of any bonds that are advertised for redemption, and described in the said notice in manner as aforesaid, shall, upon the day appointed and designated in the said notice, present the same to the city treasurer for redemption and payment; and any and all bonds advertised for and described in any of the said notices, which shall not be presented for redemption and payment upon the day specified and designated in the said notices, shall cease to bear interest from that day and date.

SEC. 5. That the bonds herein authorized to be issued and sold

79 or disposed of shall be numbered in rotation from one up, and shall be issued in sums of one hundred dollars or any multiple thereof, not to exceed the sum of five thousand dollars. They shall be payable to or bearer, and shall be signed by the mayor and countersigned by the city treasurer, and recorded in the office of the city clerk, in a book to be kept specially for that purpose; and there shall be affixed to the said bonds the corporate seal of the city of Galveston.

SEC. 6. That in order to provide for the semi-annually-accruing interest on the said bonds, and to create a sinking-fund to pay the principal of the said bonds at their maturing or when they are redeemed, there is hereby appropriated all the sums of money realized from assessments made on the property abutting or fronting upon the sidewalks improved by means of the sale or other disposition of said bonds; and all sums of money so assessed and collected shall be paid to the city treasurer, who shall pass and place the same to the credit of a fund to be
80 styled "Interest and sinking-fund of Galveston city bonds for sidewalk improvement." The fund so created and accumulated shall be deemed a special fund, and shall be used solely and exclusively for paying the interest and principal of the bonds herein authorized to be issued and disposed of.

SEC. 7. That the application of any portion of the special fund created by the preceding section in any manner other than therein provided for, shall entail upon the officers of the city misappropriating said special fund all the pains and penalties contained in and imposed by section 4, article 3, title IV, of the charter of the city of Galveston.

SEC. 8. That the mayor and the chairman of the committee on streets and alleys shall provide for the sale, negotiation, and disposal of the bonds herein and hereby authorized to be issued and disposed of.

SEC. 9. That this ordinance shall take effect and be in force from and after its passage.

Approved August 19, 1873.

81 C. W. HURLEY, *Mayor.*

Attest:

C. C. ALLEN, *City Clerk.*

(The foregoing answer endorsed as follows, to wit:) No. 863. D. G. Hitchcock & Co. vs. The City of Galveston. Defendant's answer. Filed Dec'r 16th, 1874. C. Dart, clerk. W. L. Mann, city att'y. Ballinger, Jack & Mott, Flournoy, Sherwood & Scott, att'ys for defendant.

82 *Agreement of counsel.—Filed Jan'y 8th, 1875.*

U. S. C. court.

D. G. HITCHCOCK & Co. }
v. } No. 863.
THE CITY OF GALVESTON. }

In the above cause it is agreed by the respective parties, through their counsel, that, the court consenting, the said cause shall be set down for trial on the fifteenth (15th) day of February, 1875.

And the order of the court is hereby asked, setting the cause as aforesaid for said day.

F. CHARLES HUME,
Counsel for Plaintiffs.
BALLINGER, JACK & MOTT,
Att'ys for Def't.

(Endorsed:) Filed Jan'ry 8th, 1875. C. Dart, clerk.

83 *Precipe by plaintiffs for subpœnas for wit's.—Filed Jan'y 15th, 1875.*

GALVESTON, TEXAS, 12 *Jan'y*, 1875.

U. S. C. C.

D. G. HITCHCOCK & Co.
v.
THE CITY OF GALVESTON. } No. 836.

To the clerk of the circuit c't of U. S., Galveston, Tex.:

DEAR SIR: Please issue the process of subpœna to those whose names hereinafter appear, to attend the said court on the 15th February next, as witnesses for the plaintiffs in the above cause, to wit: Major G. M. Frazell; Capt. Abram Cross; Abram Hoxie; J. V. Smith; Matthias Valk; Hays and Sternberg; James and Robert Alexander; Kilpatrick, of Burnett & Kilpatrick; John Highland, city lumber-inspector; C. C. Allen, city clerk; and to said Allen issue the subpœna duces tecum, commanding him to bring with him all the records and books of his office and of the said city of Galveston. Also subpœna Lary Norton, T. A. Washington, and J. H. Burnett, of Burnett & Kilpatrick.

Very resp'y, y'r ob't serv't,

F. CHARLES HUME,
Counsel for Plaintiffs.

84 (Endorsed:) Filed Jan'ry 15, '75. C. Dart, clerk, by J. T. Spann, deputy.

85 *Subpœna for Larry Norton.*

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

You are hereby commanded to summon Larry Norton to be *be* and appear before the honorable circuit court of the United States for the eastern district of Texas, at the court-house in the city of Galveston, on the fifteenth day of Feb'y, A. D. 1875, at 10 o'clock a. m., to testify in behalf of plaintiffs in cause No. 863, circuit law, entitled "D. G. Hitchcock & Co. vs. The City of Galveston," and not to depart the court without leave of the court or district attorney.

Herein fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and seal of the said circuit court, at the city of Galveston, this 15th day of January, in the year of our Lord one thousand eight hundred and seventy-five.

86 [SEAL.]

C. DART,
Clerk E. D. T., at Galveston,
By J. T. SPANN,
Deputy.

Marshal's return.

Received this subpœna on the 15th day of January, 1875, and executed the same on the 18th day of January, 1875, by reading this writ to the within-named witness; and also tendered to him one dollar and fifty cents, which he accepted, as witness-fee for the day summoned.

L. D. EVANS,
U. S. Marshal E. D. T.,
By M. K. CANFIELD,
Deputy.

(Endorsed:) Filed Feb'y 15, '75. C. Dart, clerk, by Geo. C. Rives dep.

Subpœ. for J. N. Smith.

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

You are hereby commanded to summon J. V. Smith, of the city of Galveston, to be and appear before the honorable circuit court of
87 the *of the* United States for the eastern district of Texas, at the court-house in the city of Galveston, on the fifteenth day of February, A. D. 1875, at 10 o'clock a. m., to testify in behalf of plaintiffs in cause No. 863, circuit law, entitled "D. G. Hitchcock & Co. vs. The City of Galveston," and not to depart the court without leave of the court or district attorney.

Herein fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and seal of the said circuit court, at the city of Galveston, this 15th day of January, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.]

C. DART,
Clerk E. D. T., at Galveston,
By J. T. SPANN,
Deputy.

Marshal's return.

Received this subpœna on the 15th day of January, 1875, and executed the same on the 18th day of January, 1875, by reading this writ
88 to the within-named witness, and also tendered to said witness one dollar and fifty cents, which he accepted, as witness-fee for the day summoned.

L. D. EVANS,
U. S. Marshal E. D. T.,
By M. K. CANFIELD,
Deputy.

(Endorsed:) Filed Feb'y 15, '75. C. Dart, clerk, by Geo. C. Rives, dep.

Subpœna for John Highland.

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

You are hereby commanded to summon John Highland, city lumber-inspector, to be and appear before the honorable circuit court of the United States for the eastern district of Texas, at the court-house in the city of Galveston, on the fifteenth day of February, A. D. 1875, at 10 o'clock a. m., to testify in behalf of plaintiffs in cause No. 863,
89 circuit law, entitled "D. G. Hitchcock & Co. vs. The City of Galveston," and not depart the court without leave of the court or district attorney.

Herein fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and seal of the said circuit court, at the city of Galveston, this 15th day of January, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.]

C. DART,
Clerk E. D. T., at Galveston,
By J. T. SPANN,
Deputy.

Marshal's return.

Received this subpœna on the 15th day of January, 1875, and executed the same on the 16th day of January, 1875, by reading this writ to the within-named witness, and also tendered to said witness one dollar and fifty cents, which he accepted, as witness-fee for the day summoned.

L. D. EVANS,
U. S. Marshal E. D. T.,
By M. K. CANFIELD,
Deputy.

90 (Endorsed:) Filed Feb'ry 15, '75. C. Dart, cl'k, by Geo. C. Rives, deputy.

Subpœ. for C. C. Allen.

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

You are hereby commanded to summon C. C. Allen, city clerk, to be and appear before the honorable circuit court of the United States for the eastern district of Texas, at the court-house in the city of Galveston, on the fifteenth day of February, A. D. 1875, at 10 o'clock a. m., to testify in behalf of plaintiffs in cause No. 863, circuit law, entitled "D. G. Hitchcock & Co. vs. The City of Galveston," and not to depart the court without leave of the court or district attorney.

Herein fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the
91 Supreme Court of the United States, and seal of the said circuit court, at the city of Galveston, this 15th day of January, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.]

C. DART,
Clerk E. D. T., at Galveston,
By J. T. SPANN,
Deputy.

By direction of plaintiffs' attorney, M'r Allen is requested to bring with him all the records and books of his office and of the said city of Galveston.

Marshal's return.

Received this subpœna on the 15th day of January, 1875, and executed the same on the 16th day of January, 1875, by reading this writ to the within-named witness, and also tendered to said witness one dollar and fifty cents, which he accepted, as witness-fee for the day summoned.

L. D. EVANS,
U. S. Marshal E. D. T.,
By M. K. CANFIELD,
Deputy.

(Endorsed:) Filed Feb'ry 15, '75. C. Dart, cl'k, by Geo. C. Rives, dep.

92 *Subpœ. for Sternberg.*

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

You are hereby commanded to summon Sternberg to be and appear before the honorable circuit court of the United States for the eastern district of Texas, at the court-house in the city of Galveston, on the fifteenth day of February, A. D. 1875, to testify in behalf of plaintiffs in cause No. 863, entitled "D. G. Hitchcock & Co. vs. The City of

Galveston," and not to depart the court without leave of the court or district attorney.

Herein fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and seal of the said circuit court, at the city of Galveston, this 15th day of January, in the year of our Lord one thousand eight hundred and seventy-five.

93 [SEAL.]

C. DART,
Clerk E. D. T., at Galveston.
By J. T. SPANN,
Deputy.

Marshal's return.

Received this subpœna on the 15th day of January, 1875, and executed the same on the 16th day of January, 1875, by reading this writ to the within-named witness, and also tendered to said witness one dollar and fifty cents, which he accepted, as witness-fee for the day summoned.

L. D. EVANS,
U. S. Marshal E. D. T.,
By M. K. CANFIELD,
Deputy.

(Endorsed:) Filed Feb'ry 15, '75. C. Dart, cl'k, by Geo. C. Rives, dep.

Subpœ. for J. H. Burnett.

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

You are hereby commanded to summon J. H. Burnett, of the firm of Burnett & Kilpatrick, to be and appear before the honorable
94 court of the United States for the eastern district of Texas, circuit at the court-house in the city of Galveston, on the fifteenth day of February, A. D. 1875, at 10 o'clock a. m., to testify in behalf of plaintiffs in cause No. 863, circuit law, entitled "D. G. Hitchcock & Co. vs. The City of Galveston," and not to depart the court without leave of the court or district attorney.

Herein fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United , and seal of the said circuit court, at the city of Galveston, this 15th day of January, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.]

C. DART,
Clerk E. D. T., at Galveston,
By J. T. SPANN,
Deputy.

Marshal's return.

Received this subpœna on the 15th day of January, 1875, and executed the same on the 16th day of January, 1875, by reading writ to the within-named witness, and also tendered to him one dollar and
95 fifty cents, which he accepted, as witness-fee for the day summoned.

L. D. EVANS,
U. S. Marshal E. D. T.,
By M. K. CANFIELD,
Deputy.

(Endorsed:) Filed Feb'ry 15, '75. C. Dart, cl'k, by Geo. C. Rives, dep.

Subpœ. for Abram Cross.

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

You are hereby commanded to summon Capt. Abram Cross, of the city of Galveston, to be and appear before the honorable circuit court of the United States for the eastern district of Texas, at the court-house in the city of Galveston, on the fifteenth day of February, A. D. 1875, at 10 o'clock a. m., to testify in behalf of plaintiffs in cause No. 863, circuit law, entitled "D. G. Hitchcock & Co. vs. The City of Galveston," and not to depart the court without leave of the court or district attorney.

Herein fail not.

96 Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and seal of the said circuit court, at the city of Galveston, this 15th day of January, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.]

C. DART,
Clerk E. D. T., at Galveston,
By J. T. SPANN,
Deputy.

Marshal's return.

Received this writ on the 15th day of January, 1875, and executed the same on the 16th day of January, 1875, by reading writ to the within-named witness, and also tendered to him one dollar and fifty cents, which he accepted, as witness-fee for the day summoned.

L. D. EVANS,
U. S. Marshal E. D. T.,
By M. K. CANFIELD,
Deputy.

(Endorsed:) Filed Feb'ry 15, '75. C. Dart, cl'k, by Geo. C. Rives, dep.

Subpœ. for A. Hoxie.

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

97 You are hereby commanded to summon Abram Hoxie, of the city of Galveston, to be and appear before the honorable circuit court of the United States for the eastern district of Texas, at the court-house in the city of Galveston, on the fifteenth day of Feb'y, A. D. 1875, at 10 o'clock a. m., to testify in behalf of the plaintiffs in case No. 863, circuit law, entitled "D. G. Hitchcock & Co. vs. The City of Galveston," and not to depart the court without leave of the court or district attorney.

Herein fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and seal of the said circuit court, at the city of Galveston, this 15th day of January, in the year of ou' Lord one thousand eight hundred and seventy-five.

[SEAL.]

C. DART,
Clerk E. D. T., at Galveston,
By J. T. SPANN,
Deputy.

Marshal's return.

98 Received this writ on the 15th day of January, 1875, and executed the same on the 16th day of January, 1875, by reading writ to the within-named witness, and also tendered to him one dollar and fifty cents, which he accepted, as witness-fee for the day summoned.

L. D. EVANS,
U. S. Marshal E. D. T.,
By M. K. CANFIELD,
Deputy.

(Endorsed:) Filed Feb'ry 15, '75. C. Dart, cl'k, by Geo. C. Rives, dep.

Subpœ. for Kilpatrick.

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

You are hereby commanded to summon Kilpatrick, of the firm of Burnett & Kilpatrick, to be and appear befor' the honorable circuit court of the United States for the eastern district of Texas, at the court-house in the city of Galveston, on the fifteenth day of February, A. D. 1875, at 10 o'clock a. m., to testify in behalf of plaintiffs in
99 cause No. 863, entitled "D. G. Hitchcock & Co. vs. The City of Galveston," and not to depart the court without leave of the court or district attorney.

Herein fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and seal of the said circuit court, at the city of Galveston, this 15th day of January, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.]

C. DART,
Clerk E. D. T., at Galveston,
By J. T. SPANN,
Deputy.

Marshal's return.

Received this writ on the 15th day of January, 1875, and executed the same on the 16th day of January, 1875, by reading writ to the within-named witness, and also tendered to him one dollar and fifty cents, which he accepted, as witness-fee for the day summoned.

L. D. EVANS,
U. S. Marshall E. D. T.,
By M. K. CANFIELD,
Deputy.

100 (Endorsed:) Filed Feb'ry 15, '75. C. Dart, clerk, by Geo. C. Rives, dep.

Subpœ. for G. M. Frazell.

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

You are hereby commanded to summon Maj. G. M. Frazell, of the city of Galveston, to be and appear before the honorable circuit court of the United States for the eastern district of Texas, at the court-house in the city of Galveston, on the fifteenth day of February, A. D. 1875, at 10 o'clock a. m., to testify in behalf of plaintiffs in cause No. 863, circuit

law, entitled "D. G. Hitchcock & Co. vs. The City of Galveston," and not to depart the court without leave of the court or district attorney.

Herein fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and seal of the said circuit
101 court, at the city of Galveston, this 15th day of January, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.]

C. DART,
Clerk E. D. T., at Galveston,
By J. T. SPANN,
Deputy.

Marshal's return.

Received this subpœna on the 15th day of January, 1875, and executed the same on the 16th day of January, 1875, by reading this writ to the within-named witness, and also tentered to said witness one dollar and fifty cents, which he accepted, as witness-fee for the day summoned.

L. D. EVANS,
U. S. Marshal E. D. T.,
By M. K. CANFIELD,
Deputy.

(Endorsed:) Filed Feb'y 15, '75. C. Dart, cl'k, by Geo. C. Rives, dep.

Subpœ. for Hays:

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

102 You are hereby commanded to summon Hays to be and appear before the honorable circuit court of the United States for the eastern district of Texas, at the court-house in the city of Galveston, on the fifteenth day of February, A. D. 1875, at 10 o'clock a. m., to testify in behalf of plaintiffs in cause No. 863, circuit law, entitled "D. G. Hitchcock & Co. vs. The City of Galveston," and not to depart the court without leave of the court or district attorney.

Herein fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and seal of the said circuit court, at the city of Galveston, this 15th day of January, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.]

C. DART,
Clerk E. D. T., at Galveston,
By J. T. SPANN,
Deputy.

Marshal's return.

103 Received this subpœna on the 15th day of January, 1875, and executed the same on the 16th day of January, 1875, by reading this writ to the within-named witness, and also tendered to said witness one dollar and fifty cents, which he accepted, as witness-fee for the day summoned.

L. D. EVANS,
U. S. Marshal E. D. T.,
By M. K. CANFIELD,
Deputy.

(Endorsed:) Filed Feb'y 15, '75. C. Dart, cl'k, by Geo. C. Rives, dep.

Subpœ. for Rob't Alexander.

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

You are hereby commanded to summon Robert Alexander to be and appear before the honorable circuit court of the United States for the eastern district of Texas, at the court-house in the city of Galveston, on the fifteenth day of February, A. D. 1875, at 10 o'clock a. m., to testify in behalf of plaintiffs in cause No. 863, circuit law, entitled
104 "D. G. Hitchcock & Co. vs. The City of Galveston," and not to depart the court without leave of the court or district attorney.

Herein fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and seal of the said circuit court, at the city of Galveston, this 15th day of January, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.]

C. DART,
Clerk E. D. T., at Galveston,
By J. T. SPANN,
Deputy.

Marshal's return.

Received this subpœna on the 15th day of January, 1875, and executed the same on the 18th day of January, 1875, reading this writ to the within-named witness, and tendering to him one dollar and fifty cents, which he accepted, as witness-fee for the day summoned.

L. D. EVANS,
U. S. Marshal E. D. T.,
By M. K. CANFIELD,
Deputy.

105 (Endorsed:) Filed Feb'y 15, '75. C. Dart, cl'k, by Geo. C. Rives, dep.

Subpœ. for Mathias Valk.

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

You are commanded to summon Mathias Valk to be and appear before the honorable circuit court of the United States for the eastern district of Texas, at the court-house in the city of Galveston, on the fifteenth day of February, A. D. 1875, at 10 o'clock a. m., to testify in behalf of plaintiffs in cause No. 863, circuit law, entitled "D. G. Hitchcock & Co. vs. The City of Galveston," and not depart the court without leave of the court or district attorney.

Herein fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and seal of said circuit court,
106 at the city of Galveston, this 15th day of January, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.]

C. DART,
Clerk E. D. T., at Galveston,
By J. T. SPANN,
Deputy.

Marshal's return.

Received this subpœna on the 15th day *day* of January, 1875, and executed the same on the 18th day of January, 1875, by reading this writ to the within-named witness, and also tendering to him one dollar and fifty cents, which he accepted, as witness-fee for the day summoned.

L. D. EVANS,
U. S. Marshal E. D. T.,
By M. K. CANFIELD,
Deputy.

(Endorsed:) Filed Feb'ry 15, '75. C. Dart, cl'k, by Geo. C. Rives, dep.

Subpœ. for James Alexander.

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

You are hereby commanded to summon James Alexander to be
107 and appear before the honorable circuit court of the United States for the eastern district of Texas, at the court-house in the city of Galveston, on the fifteenth day of February, A. D. 1875, at 10 o'clock a. m., to testify in behalf of plaintiffs in cause No. 863, circuit law, entitled "D. G. Hitchcock & Co. vs. The City of Galveston," and not to depart the court without leave of the court or district attorney.

Herein fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and seal of the said circuit court, at the city of Galveston, this 15th day of January, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.]

C. DART,
Clerk E. D. T., at Galveston,
By J. T. SPANN,
Deputy.

Marshal's return.

Received this subpœna on the 15th day of January, 1875, and executed the same on the 18th day of January, 1875, by reading this writ to the within-named witness, and tendering to said witness one
108 dollar and fifty cents, as witness-fee for the day summoned.

L. D. EVANS,
U. S. Marshal E. D. T.,
By M. K. CANFIELD,
Deputy.

(Endorsed:) Filed Feb'y 15, '75. C. Dart, cl'k, by Geo. C. Rives, dep.

Subpœ. for T. A. Washington.

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

You are hereby commanded to summon T. A. Washington to be and appear before the honorable circuit court of the United States for the eastern district of Texas, at the court-house in the city of Galveston, on the fifteenth day of February, A. D. 1875, at 10 o'clock a. m., to testify in behalf of plaintiffs in cause No. 863, circuit law, entitled "D. G.

Hitchcock & Co. vs. The City of Galveston," and not to depart the court without leave of the court or district attorney.

Herein fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the
109 Supreme Court of the United States, and seal of the said circuit court, at the city of Galveston, this 15th day of January, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.]

C. DART,
Clerk E. D. T., at Galveston,
By J. T. SPANN,
Deputy.

Marshal's return.

Received this subpœna on the 15th day of January, 1875, and executed the same on the 16th day of January, 1875, by reading this writ to the within-named witness, and also tendered to said witness one dollar and fifty cents, which he accepted, as witness-fee for the day summoned.

L. D. EVANS,
U. S. Marshal E. D. T.,
By M. K. CANFIELD,
Deputy.

(Endorsed:) Filed Feb'y 15, '75. C. Dart, clerk, by Geo. C. Rives, dep.

Subpœ. for Washington.

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

110 You are hereby commanded to summon Washington, civil engineer of the city of Galveston, to be and appear before the honorable circuit court of the United States for the eastern district of Texas, at the court-house in the city of Galveston, forthwith, to testify in behalf of defendant in case No. 863, D. G. Hitchcock & Co. vs. The City of Galveston, and not to depart the court without leave of the court.

Herein fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and seal of the said circuit court, at the city of Galveston, this 15th day of February, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.]

C. DART,
Clerk E. D. T., at Galveston.

Marshal's return.

Received this writ Feb'y 15th, 1875, and executed the Feb'y 16th, 1875.

L. D. EVANS,
U. S. Marshal,
By M. K. CANFIELD,
Deputy.

111 (Endorsed:) Filed Feb'y 20, 1875. C. Dart, clerk.

Subpœ. for R. P. Boyce.

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

You are hereby commanded to summon R. P. Boyce, of the city of Houston, to be and appear before the honorable circuit court of the United States for the eastern district of Texas, at the court-house in the city of Galveston, forthwith, to testify in behalf of defendant in case No. 863, D. G. Hitchcock & Co. vs. The City of Galveston, and not to depart the court without leave of the court.

Herein fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and the seal of the said circuit , at the city of Galveston, this 15th day of February, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.]

C. DART,
Clerk E. D. T., at Galveston.

112 *Marshal's return.*

Received Feb'y 16, 1875, and executed Feb'y 16, 1875, by reading the within summons to the within-named R. P. Boyce.

L. D. EVANS,
U. S. Marshal E. D. T.,
By JOHN CLEMOW,
Deputy.

(Endorsed:) Filed Feb'y 17th, 1875. C. Dart, clerk.

Subpœ. for Geo. Granger.

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

You are hereby commanded to summon George Granger, of the city of Galveston, to be and appear before the honorable circuit court of the United States for the eastern district of Texas, at the court-house in the city of Galveston, forthwith, in behalf of defendant, in case No. 863, D. G. Hitchcock & Co. vs. City of Galveston, and not to depart the court without leave of the court.

Herein fail not.

113 Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and seal of the said circuit court, at the city of Galveston, this 15th day of February, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.]

C. DART,
Clerk E. D. T., at Galveston.

Marshal's return.

Received this writ February 15th, 1875, and executed February 16th, 1875.

L. D. EVANS,
U. S. Marshal E. D. T.,
By M. K. CANFIELD,
Deputy.

(Endorsed:) Ret'd & filed Feb'y 25, '75. C. Dart, clerk, by James Spann, deputy.

Subpœ. for J. W. Jockusch.

The President of the United States of America to the marshall of the eastern district of Texas, greeting:

You are hereby commanded to summon J. W. Jockusch, of the city of Galveston, to be and appear before the honorable circuit court of the United States for the eastern district of Texas, at the court-house
114 in the city of Galveston, forthwith, to testify in behalf of defendant, in case No. 863, D. G. Hitchcock & Co. vs. The City of Galveston, and not to depart the court without leave of the court.

Herein fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and seal of the said circuit court, at the city of Galveston, this 15th day of February, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.]

C. DART,
Clerk E. D. T., at Galveston.

Marshal's return.

Received this writ February 15th, 1875, and executed February 16th, 1875.

L. D. EVANS,
U. S. Marshal E. D. T.,
By M. K. CANFIELD,
Deputy.

(Endorsed:) Filed Feb'y 20, 1875. C. Dart, cl'k.

Subpœ. for C. W. Hurley.

The President of the United States of America to the marshal of
115 the eastern district of Texas, greeting:

You are hereby commanded to summon C. W. Hurley, of the city of Galveston, to be and appear before the honorable circuit court of the United States for the eastern district of Texas, at the court-house in the city of Galveston, forthwith, to testify in behalf of defendant, in case No. 863, D. G. Hitchcock & Co. vs. City of Galveston, and not to depart the court without leave of the court.

Herein fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and seal of the said circuit court, at the city of Galveston, this 15th day of Feb'y, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.]

C. DART,
Clerk E. D. T., at Galveston.

Marshal's return.

Received this writ February 15th, 1875, and executed February 16th, 1875.

L. D. EVANS,
U. S. Marshal E. D. T.,
By M. K. CANFIELD,
Deputy.

116 (Endorsed:) Filed Feb'y 20, 1875. C. Dart, cl'k.

Subpœ. for J. C. Ogle.

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

You are hereby commanded to summon J. C. Ogle, of the city of Galveston, to be and appear before the honorable circuit court of the United States for the eastern district of Texas, at the court-house in the city of Galveston, forthwith, to testify in behalf of defendant, in case No. 863, D. G. Hitchcock & Co. v. The City of Galveston, and not to depart the court without leave of the court.

Herein fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and seal of the said circuit court, at the city of Galveston, this 15 day of February, in the year of our
117 Lord one thousand eight hundred and seventy-five.

[SEAL.] C. DART,
Clerk E. D. T., at Galveston.

Marshal's return.

Received this writ February 15th, 1875, and executed February 16th, 1875.

L. D. EVANS,
U. S. Marshal E. D. T.,
By M. K. CANFIELD,
Deputy.

(Endorsed:) Filed Feb'y 20, 1875. C. Dart, cl'k.

Subpœ. for J. W. Colvin.

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

You are hereby commanded to summon J. W. Colvin, of the city of Galveston, to be and appear before the honorable circuit court of the United States for the eastern district of Texas, at the city of Galveston, forthwith, to testify in behalf of defendant in case No. 863, D. G. Hitchcock & Co. v. City of Galveston, and not to depart the court without leave of the court.

Herein fail not.

118 Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and seal of the said circuit court, at the city of Galveston, this 15th day of February, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.] C. DART,
Clerk E. D. T., at Galveston.

Marshal's return.

Received this writ Feb'y 15, 1875, and executed the same Feb'y 16, 1875.

L. D. EVANS,
U. S. Marshal E. D. T.,
By M. K. CANFIELD,
Deputy.

(Endorsed:) Filed Feb'y 20, 1875. C. Dart, cl'k.

Subpœ. for Frazell.

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

You are hereby commanded to summons Frazell, civil engineer, of the city of Galveston, to be and appear before the honorable
119 circuit court of the United States for the eastern district of Texas, at the court-house in the city of Galveston, forthwith, to testify in behalf of defendant, in case No. 863, D. G. Hitchcock & Co. v. City of Galveston, and not depart the court without leave of the court.

Herein fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, seal of the said circuit court, at the city of Galveston, this 15th day of February, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.]

C. DART,
Clerk E. D. T., at Galveston.

Marshal's return.

Received this writ Feb'y 15, 1875, and executed the same on 16th Feb'y, 1875.

L. D. EVENS,
U. S. Marshal E. D. T.,
By M. K. CANFIELD,
Deputy.

(Endorsed:) Filed Feb'y 20, 1875. C. Dart, cl'k.

120 *Subpœna for C. C. Allen.*

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

You are hereby commanded to summon C. C. Allen, city clerk, city of Galveston, to be and appear before the honorable circuit court of the United States for the eastern district of Texas, at the court-house in the city of Galveston, forthwith, to testify in behalf of defendant, in case No. 863, D. G. Hitchcock & Co. v. City of Galveston, and not to depart the court without leave of the court.

Herein fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and seal of the said circuit court, at the city of Galveston, this 15th day of February, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.]

C. DART,
Clerk E. D. T., at Galveston.

121 *Marshal's return.*

Received this writ February 15th, 1875, and executed February 16th, 1875.

L. D. EVANS,
U. S. Marshal E. D. T.,
By M. K. CANFIELD,
Deputy.

(Endorsed:) Filed Feb'y 20, 1875. C. Dart, cl'k.

Subpœ. for P. H. Hennessy.

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

You are hereby commanded to summon P. H. Hennessey, of the city of Galveston, to be and appear before the honorable circuit court of the United States for the eastern district of Texas, at the court-house in the city of Galveston, forthwith, to testify in behalf of defendant, in case No. 863, D. G. Hitchcock & Co. v. The City of Galveston, and not to depart the court without leave of the court.

Herein fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the
122 Supreme Court of the United States, and seal of the said circuit court, at the city of Galveston, this 15th day of February, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.]

C. DART,
Clerk E. D. T., at Galveston.

Marshal's return.

Received this writ February 15th, 1875, and executed the same February 16th, 1875.

L. D. EVANS,
U. S. Marshal E. D. T.,
By M. K. CANFIELD,
Deputy.

(Endorsed:) Filed Feb'y 20, 1875. C. Dart, cl'k.

Subpœ. for Geo. Sealy.

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

You are hereby commanded to summon George Sealy to be and appear before the honorable circuit court of the United States for the eastern district of Texas, at the court-house in the city of Galveston, forthwith, to testify in behalf of defendant, in case No. 863, D.
123 G. Hitchcock & Co. vs. City of Galveston, and not to depart the court without leave of the court.

Herein fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and seal of the said circuit court, at the city of Galveston, this 15th day of Feb'y, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.]

C. DART,
Clerk E. D. T., at Galveston

Marshal's return.

Received this writ February 15th, 1875, and executed February 16th, 1875.

L. D. EVANS,
U. S Marshal E. D. T.,
By M. K. CANFIELD,
Deputy.

(Endorsed:) Filed Feb'y 20, 1875. C. Dart, clerk.

Plaintiffs' demurrer to def't's 1st plea, etc.—Filed Feb'y 17, 1875.

U. St. circuit court.

D. G. HITCHCOCK & Co.
vs.
THE CITY OF GALVESTON. } No. 863.

And now come the said plaintiffs and demur to the first plea
124 of defendant, and say that it is insufficient in law to be considered by the court or answered unto by plaintiffs, for they say it is a plea in abatement of the action and not to the jurisdiction of the court, and is not sworn to positively, as the law requires, but only according to the best knowledge and belief of affiants.

Wherefore they pray that it may be adjudged insufficient by the court and stricken out.

And without waiving said demurrer, and motion to strike out said plea, plaintiffs, in the event the same be overruled, deny the truth of the allegations of said plea, and allege the facts to be as averred in their petition. And of this they put themselves upon the country.

F. CHARLES HUME,
Counsel for Plaintiffs.

The foregoing demurrer endorsed as follows: Filed Feb'y 17, '75. C. Dart, clerk.

125 *Amended petition.—Filed Feb'y* 17, 1875.

U. S. circ't court.

D. G. HITCHCOCK & Co.
v.
THE CITY OF GALVESTON. } No.

And now with leave of court come the said plaintiffs, and, amending their petition herein, say that the answer of defendant, and each and every part thereof, is insufficient in law, and presents no defence to said petition. And of this they pray judgment of the court.

And plaintiffs set down specially the following among other grounds of demurrer to said answer:

1st. To the sixth plea thereof, in so far as it purports to be a plea of non est factum supported by affidavit, because they say it is wholly insufficient in law to be considered by the court, in this, that it consists of mere allegations of legal conclusions, and contains no statement of facts proper or pertinent to that character of plea, and is not sworn to either by the person or in the manner required by law.

2nd. To the seventh plea thereof, because, while seeking to avoid said contract upon the averment of fraud on plaintiffs' part in its pro-
126 curement, said plea contains no allegation of fact whatsoever by which they may be advised as to what they shall answer unto, and is a mere statement of a legal conclusion of defendant, which is not proper to be considered of or responded to by plaintiffs. Wherefore they pray judgment of the court declaring said pleas insufficient, and that they be stricken out.

And, further amending, plaintiffs make exhibit of the said several ordinances referred to by numbers and dates in their original petition and set them forth in their printed forms as adopted, approved, and pub-

lished by defendant, and set forth in the sixth plea of its answer herein, numbered as in their said original petition; and they refer to said ordinances thus exhibited as embracing the authority for the making of said contract and as the averment thereof in specific terms. And they also show to the court the authority under which the bonds named in said contract were issued, by exhibiting herewith the ordinance authorizing said issuance as adopted, approved, printed, and published by defendant, and set forth in the sixth plea of its said answer, entitled "An or-
127 dinance authorizing the issuance and sale of two hundred and fifty thousand dollars of the bonds of the city of Galveston for the purpose of improving sidewalks by filling, raising, paving, and curbing the same." Each and all of said ordinances, as hereinbefore are described and as made part of defendant's said sixth plea, are attached and appended hereto as part hereof, to be read in their proper connection with the preceding allegations.

And, further amending, plaintiffs say that the report of a committee of defendant, alleged in their original petition to constitute a ratification, confirmation, and approval of said contract, was made on the 28th of March, 1874, to the city council of defendant, in pursuance of a resolution thereof passed 24 same month, and is of record in the archives and official papers of defendant, and it is charged with notice of the contents thereof, and is notified to produce the same in court; that said committee, composed of Aldermen Hennessey, Sealy, and Moseback of said council, report said contract to have been improvidently entered into "in some particulars" by the contracting parties on the part of the city, but find no other fault with it, and recommend that work pro-
128 ceed substantially under its terms, and report an ordinance to that effect (No. 3) amending the first and second sections of said ordinance No. 37 and leaving unchanged the third section thereof, wherein is contained the authorization to the mayor and chairman of the committee on streets and alleys to make said contract; that at the same meeting of said council a minority report was made by a member of said committee under said resolution of 24 March, which is also of record in defendant's archives and here required to be produced in court, declaring said contract to be null, void, and ultra vires; that upon consideration and discussion of said reports the majority report was adopted by the council, and the ordinance reported therewith read first time under the rules; that by the terms of the 27 standing rule of said council "the adoption of a report is equivalent to an indorsement of its contents;" that the said proceeding resulting as aforesaid in the adoption of said majority and the rejection of said minority report, indorsed, approved, ratified, and confirmed the said contract as the act and deed of defendant.

And plaintiffs show that thereafter, upon a memorial by its citi-
129 zens protesting against said contract with plaintiffs, defendant appointed a committee of its council, consisting of Aldermen Chapman, Sealy, and Hennessey, to meet a committee of said citizens in consultation upon and about said contract, and in said consultation to represent the thought, sentiment, and wishes of the city council as a government upon that subject, and to speak and act in its behalf; that in said consultation held early in April, 1874, said aldermen in their capacity as representatives of the city council, severally and together, declared that said contract with plaintiffs was lawful and binding upon the parties thereto; and thereby defendant ratified, confirmed, and pronounced valid the said contract with plaintiffs.

And plaintiffs allege, as in their original petition, that repeatedly after

the execution of said contract it was ratified and confirmed as its act and deed by defendant and its said officers and agents. And plaintiffs show that in fact the said ordinances under which said contract was made have never been repealed by defendant, and the same are now in full force; and that as late as and upon the 16th February, 1875, one
130 of said ordinances (No. 37, approved 3rd Feb'y, 1874) was expressly recognized by defendant as in force in a regular meeting of its council upon that date by the formal consideration of a' amendment thereto by said council, as appears from the proceedings thereof.

And, further amending, plaintiffs say that the uniform usage and business custom of defendant in respect to the making of contracts for all purposes whatsoever was at and before the date of said contract herein sued on, and as they are informed and believe still is, to direct their execution by and through committees thereto empowered and appointed by the council, and entrusted with full power and discretion concerning the terms and conditions thereof, in the same manner and to the same degree, prescribed and indicated by the said council in respect to the said contract of plaintiffs; that during the entire corporate existence of defendant no other general mode of making contracts by it has ever been known or pursued, and its official records disclose no exception whatsoever to said mode, unless occurring under circumstances showing action by some one not authorized by defendant thereto, in which
131 said exceptional instances defendant has sometimes, but not always, executed by its council acts of ratification thereof; that said custom has prevailed so long, and has been and is so universal, that defendant is estopped to assert the invalidity of contracts made with and by it in conformity therewith, and especially the contract herein sued on.

And plaintiffs hereby put in issue the facts alleged in said answer, in so far as the same do not consist with the averments of their original and amended petition, and repeat their prayer for judgment.

F. CHARLES HUME,
Counsel for Plaintiffs.

No. 21.

An ordinance to provide for the filling-up, grading, and paving of certain sidewalks, and to curb the same.

Be it ordained by the city council of the city of Galveston:

SECTION 1. That the mayor and the chairman of the committee on streets and alleys be, and they are hereby, authorized and directed
132 to enter into and make a contract, or contracts, with proper and responsible parties, to fill up, grade, and pave the sidewalks on both sides of the hereinafter-named streets, and to curb the same; and for this purpose they are hereby directed to advertise for the period of thirty days for bids or proposals to fill up, grade, pave, and curb, in part or in whole, the sidewalks herein named. The sidewalks to be improved under this ordinance shall be those on both sides the following streets, to wit, Strand, Mechanic, and Post-Office streets, each between Eighteenth and Twenty-fifth streets; also on both sides of Market street from Eighteenth to Thirty-third street; also on both sides of Nineteenth, Twentieth, Twenty-first, Twenty-second, Twenty-third, and Twenty-fourth streets, each between Strand and Post-Office streets; and also on the west side of Eighteenth and on the east side of Twenty-fifth streets, each between Strand and Post-Office streets.

SEC. 2. That the said sidewalks shall be paved either with asphalt, brick, or concrete stone made by the use of Portland cement; and the

curbing around the same shall be made of the best pressed brick
133 laid in Portland cement.

SEC. 3. That the owners of lots, or parts of lots, who represent in each separate block a majority of the feet fronting or abutting upon any sidewalk of the same, which is to be paved under this ordinance, shall have the right, by application addressed to the mayor, at any time before the said bids or proposals are received, to select and designate which of the said materials they prefer and desire to be used in the construction of the pavement to be laid down on the said designated sidewalk; and if the owners of a majority of the frontage on each separate sidewalk cannot agree as to the material to be used in paving their respective sidewalks, or for any other cause fail to make the selection as provided for in this section, then in that event the mayor and the chairman on streets and alleys shall select and determine the material to be used.

SEC. 4. That where pavements have already been made, (excepting such as are made of planks or boards,) and they are found to be below the established grade, the owners or agents of the property front-
134 ing on the same shall be notified by the street superintendent to raise the same forthwith to the required height; and if not done in accordance with the said notice, then and in that event the mayor and chairman of the committee on streets and alleys shall cause the same to be done by contract or otherwise, and the cost thereof shall be assessed, as hereinafter provided, against the property fronting or abutting on the said sidewalk; where sidewalks have been planked over, or platforms of planks or boards have been made across the sidewalk, they shall be taken up and removed, and the sidewalk shall be paved as provided herein for other sidewalks. The pavement to be laid upon each sidewalk shall be uniform throughout the same; that is to say, shall be composed of the same material, except where parts of a sidewalk are already paved.

SEC. 5. That the cost of filling, raising, curbing, and paving each separate sidewalk, as soon as the same shall be finished and completed, shall be a charge against the property fronting and abutting thereon, and shall be assessed against the same in the following manner,
135 to wit: As soon as each sidewalk in each separate block is finished and completed the city engineer shall make out in a book regularly prepared for the purpose a full list of all lots or fractional lots fronting or abutting on the same, giving the number of each and the frontage of each on the sidewalk, the number of the block in which situated, and the names of the owners thereof if known, and, if not known, then the said lots or fractional lots shall be entered upon the said book as unknown. The said officer shall then enter or place in the said book, opposite each lot or fractional lot, its proper or pro rata portion of the cost of the filling, raising, curbing, and paving, and shall exhibit his said list, so made out and signed by him, to the city council at its next regular meeting after the said list is made out and finished, and upon the approval and acceptance of the same by the city council the amount placed on the said list opposite each lot or fractional lot shall be an assessment against the same, and each assessment so made shall date back to the time or date upon which the improvement of its respective sidewalk was finished and completed,
136 and the same shall be, until paid, a lien upon the property against which it is levied. After the approval and acceptance of the said list by the city council, it shall be signed by the mayor and countersigned by the city clerk, and placed in the hands of the city collector for collection.

SEC. 6. That the said assessment shall be paid in five annual installments, and they shall draw interest from date of assessment until paid at the rate of ten per cent. per annum. The first installment shall be due and payable immediately after the completion of the sidewalk upon which the property charged fronts or abuts; and an installment equal thereto shall become due and payable annually thereafter until the whole cost is paid.

SEC. 7. That article 348 (XV.,) 350 (XVII.,) 358 (VI.,) and 377 (II.,) of the revised ordinances of the city of Galveston, and the ordinance approved January 13, 1873 and entitled "An ordinance prohibiting the building or erection of any sidewalk or platform in the fire-limits, unless composed of brick, shell, asphaltum, or blocks of wood," in so far as they conflict with this ordinance, be and they are hereby repealed.

SEC. 11. That this ordinance shall take effect and be in force from and after its passage.

Approved August 19, 1873.

C. W. HURLEY, *Mayor.*

Attest:

C. C. ALLEN, *City Clerk.*

137 No. 26.

An ordinance to amend an ordinance entitled "An ordinance (No. 21) to provide for the filling-up, grading, and paving of certain sidewalks, and to curb the same," approved August 19, 1873.

SECTION. 1. Be it ordained by the city council of the city of Galveston, That the second section of the foregoing-named ordinance be, and the same is hereby, amended so as to read as follows, to wit:

SEC. 2. That the said sidewalks shall be paved with either of the following-named materials, viz: Asphalt, hard bricks laid in a bed of Portland cement and properly grouted, concrete made of Portland cement mixed with other proper materials, or with tile or stone laid in a bed of Portland cement; and the curbing around the same shall be made of the best hard brick, laid in Portland cement, and capped with a plank of heart-pine three inches in thickness and twelve inches wide, properly fastened to the curbing with the necessary iron bolts.

SEC. 2. Be it further ordained, That the third section to the foregoing ordinance be, and the same is hereby, amended by the addition
138 of the following to the last end of said section: "Provided, That it is herein made the duty of the street superintendent to serve written notice on all property-owners, or their authorized agents, whose sidewalks may not be of proper material and in conformity with grade, to construct the same within a period of sixty days after notice, in the manner and with one or the other of the materials named in the first section to this amendment; and any fault or failure to comply with the requirements of such notice, shall then authorize the mayor and the chairman of the committee on streets and alleys to proceed to have constructed the sidewalks in front of the property of any defaulting property owner or owners, as provided in the ordinance to which this is an amendment."

SEC. 3. Be it further ordained, That this ordinance go into effect from and after its passage.

Approved October 21, 1873.

C. W. HURLEY, *Mayor.*

Attest:

C. C. ALLEN, *City Clerk.*

No. 37.

An ordinance to provide for the filling up, grading, curbing, and paving of certain sidewalks.

139 Be it ordained by the city council of the city of Galveston:

SECTION 1. That the sidewalks on both sides of the hereinafter to be named streets shall be filled up, graded, curbed, and paved in the following manner; that is to say, the said sidewalk shall be filled up or raised to the grade established by the city engineer, and curbed with cypress wood, stone, or brick, and a pavement six feet in width laid in the centre of the same; the said pavement to be composed of either asphalt, hard brick laid in Portland cement and grouted, concrete made of Portland cement and other proper materials, tiles or stone.

SEC. 2. That the sidewalks so to be improved shall be those on both sides of Avenues B, C, and E, east from Eighteenth street to Twelfth street, and west from Twenty-fifth street to Thirty-third; and on both sides of Avenue D, from Eighteenth street to Twelfth street; and on both sides of Avenues F, G, H, I, and J from Twelfth street to Thirty-third street; and on both sides of Twelfth, Sixteenth, Twentieth, Twenty-fourth, Twenty eighth, and Thirty-third, from Avenue J (or Broadway) to Avenue B, (or Strand.)

140 SEC. 3. That the mayor and chairman of the committee of streets and alleys be, and they are hereby, authorized and directed to enter into and make contract or contracts with proper and responsible parties to fill up, grade, curb, and pave the said sidewalks.

SEC. 4. That the cost of filling, raising, curbing, and paving each separate sidewalk, as soon as the same shall be finished and completed, shall be a charge against the property fronting and abutting thereon, and shall be assessed against the same in the following manner, to wit: As soon as each sidewalk in each separate block is finished and completed, the city engineer shall make out in a book regularly prepared for the purpose a full list of all lots or fractional lots fronting or abutting on the same, giving the number of each and the frontage of each on the sidewalk, the number of the block in which situated, and the names of the owners thereof, if known, and, if not known, then the said lots or fractional lots shall be entered upon the said book as unknown. The

141 said officer shall then enter or place in the said book, opposite each lot or fractional lot, its proper or pro rata portion of the cost of the filling, raising, curbing, and paving, and shall exhibit his said list, so made out and signed by him, to the city council at its next regular meeting after the said list is made out and finished; and upon the approval and acceptance of the same by the city council, the amount placed on the said list opposite each lot or fractional lot shall be an assessment against the same, and each assessment so made shall date back to the time or date upon which the improvement of its respective sidewalk was finished and completed, and the same shall be, until paid, a lien upon the property against which it is levied. After the approval and acceptance of the said list by the city council, it shall be signed by the mayor, and countersigned by the city clerk, and placed in the hands of the city collector for collection: Provided, however, that the city engineer shall not charge for making surveys of sidewalks under this ordinance.

SEC. 5. That the said assessment shall be paid in ten annual

142 installments, and they shall draw interest from date of assessment until paid, at the rate of ten per cent. per annum. The first in-

stallment shall be due and payable immediately after the completion of the sidewalk upon which the property charged fronts or abuts, and an installment equal thereto shall become due and payable annually thereafter until the whole cost is paid.

SEC. 6. That this ordinance shall be in force and take effect from and after its passage.

Approved February 3, 1874.

C. W. HURLEY, *Mayor.*

Attest:

C. C. ALLEN, *City Clerk.*

An ordinance authorizing the issuance and sale of two hundred and fifty thousand dollars of the bonds of the city of Galveston, for the purpose of improving sidewalks by filling, raising, paving, and curbing the same.

Be it ordained by the city council of the city of Galveston:

SECTION 1. That the mayor of the city of Galveston be, and he is hereby, authorized to have printed or engraved coupon-bonds of
143 the city of Galveston to the extent of two hundred and fifty thousand dollars, to be styled "Galveston city bonds for sidewalks improvement," to draw interest from date of their sale or disposition at the rate of ten per cent. per annum till paid. The interest on said bonds shall be paid semi-annually, on the first day of March and September of each year, at the office of the city treasurer, and this shall be so expressed by coupons attached thereto. The principal of said bonds, when due or redeemable, as hereinafter provided, shall also be paid at the office of the treasurer of the city of Galveston.

SEC. 2. That the bonds hereby and herein authorized to be issued and sold shall bear the date respectively of the day upon which they are sold or disposed of, and they shall be due or payable fifteen years from their date: Provided, however, that the city council shall have the right, and such right is herein and hereby expressly reserved and retained, to redeem at par any and all of the said bonds at any time after five years from their sale or disposition.

SEC. 3. That the city council, when it shall determine to redeem any of the said bonds, as provided for in the preceding section, shall
144 instruct the city treasurer to give notice for twenty consecutive days, by publication in the official journal of the city of Galveston, that at the next succeeding day or period (after the notice) provided herein for the payment of the semi-annually-maturing coupons attached to said bonds, he will redeem the bonds described in the said notice; and the said bonds shall be redeemed in the order of their issuance; that is to say, those first issued or bearing the oldest date shall be redeemed first, and they shall be particularly described by number, date, and amount in the said notice.

SEC. 4. That the holders or owners of any bonds that are advertised for redemption and described in the said notice in manner as aforesaid shall, upon the day appointed and designated in the said notice, present the same to the city treasurer for redemption and payment; and any and all bonds advertised for and described in any of the said notices which shall not be presented for redemption and payment upon the day specified and designated in the said notices shall cease to bear interest from that day and date.

145 SEC. 5. That the bonds herein authorized to be issued and sold or disposed of shall be numbered in rotation from one up, and shall be issued in sums of one hundred dollars or any multiple thereof,

not to exceed the sum of five thousand dollars. They shall be payable to or bearer, and shall be signed by the mayor and countersigned by the city treasurer, and recorded in the office of the city clerk, in a book to be kept specially for that purpose; and there shall be affixed to the said bonds the corporate seal of the city of Galveston.

SEC. 6. That in order to provide for the semi-annually-accruing interest on the said bonds, and to create a sinking fund to pay the principal of the said bonds at their maturing or when they are redeemed, there is hereby appropriated all the sums of money realized from assessments made on the property abutting or fronting upon the sidewalks improved by means of the sale or other disposition of said bonds; and all sums of money so assessed and collected shall be paid to the city treasurer, who shall pass and place the same to the credit of a fund to be styled "Interest and sinking fund of Galveston city bonds for
146 sidewalk improvement." The fund so created and accumulated shall be deemed a special fund, and shall be used solely and exclusively for paying the interest and principal of the bonds herein authorized to be issued and disposed of.

SEC. 7. That the application of any portion of the special fund created by the preceding section in any manner other than therein provided for shall entail upon the officers of the city misappropriating said special fund all the pains and penalties contained in and imposed by section 4, article 3, title IV, of the charter of the city of Galveston.

SEC. 8. That the mayor and the chairman of the committee on streets and alleys shall provide for the sale, negotiation, and disposal of the bonds herein and hereby authorized to be issued and disposed of.

SEC. 9. That this ordinance shall take effect and be in force from and after its passage.

Approved August 19, 1873.

C. W. HURLEY, *Mayor.*

Attest:

C. C. ALLEN, *City Clerk.*

(Endorsement:) Filed Feb'y 17, '75. C. Dart, cl'k.

147 *Defendant's demurrer.—Filed Feb'y 17th, 1875.*

U. S. circuit court, eastern district of Texas, at Galveston.

D. G. HITCHCOCK & Co.
vs.
THE CITY OF GALVESTON.

On the filing of the amendments to plaintiffs' petition this day, defendants, with leave of the court, not waiving, but expressly reserving and insisting on its pleas in abatement heretofore filed, renews its demurrers to the plaintiffs' original and amended petition, and says that the grounds thereof heretofore specified apply to the said original and amended petition; and it insists on the same; and defendant sets down as further specific grounds and causes of demurrer to plaintiffs' original and amended petition that it appears therefrom as follows:

That the city of Galveston had no lawful power or authority to execute, issue, or bind itself b. the said bonds for sidewalk improvements.

That the contract sued on was not such as the city of Galveston could lawfully make, was ultra vires, null and void.

That the contract sued on was not the act or contract of the

148 city of Galveston, which could not delegate to the mayor and chairman of streets and alleys authority to make said contract in manner and form as the same is alleged in plaintiffs' petition.

That no lawful or binding ratification of said contract is alleged or shown by plaintiffs.

That said contract was incapable of valid ratification by defendant.

That the alleged acts of ratification shewn in the petition and amended petition are insufficient in law, and the general allegations of further or other ratification is insufficient in law, because the facts are not set forth or shown, but the same is general, vague, uncertain, indefinite, and insufficient in law.

That the said contract was not such as was authorized or lawful under the charter of the city, and the ordinances set forth in the amended petition, but was in violation thereof, and without authority.

That the alleged contract made by the said mayor and chairman was in excess of the powers attempted to be delegated to them; and
149 was unauthorized, unlawful, and void.

That the alleged power conferred upon said mayor and chairman of committee of streets and alleys was an entire power for the construction of sidewalks, and did not authorize them to contract for filling, grading, and curbing sidewalks, and to leave the paving thereof conditional, and not contracted for with the knowledge and joint action of plaintiffs, as was done by said contract sued on.

That the said contract did not fix the time for the performance or completion thereof in any lawful or sufficient manner under the alleged authority given to the said mayor and chairman, and was therefore illegal and void in law.

Wherefore defendant prays judgment, &c.

The preceding demurrer and the demurrer to which it is additional and supplementary, should the same be overruled, to the entire, original, and amended petition, are also filed to all of the plaintiffs' original and amended petition, except so much thereof as sues for the value
150 of work and labor actually done and materials furnished to the city of Galveston, and defendant says that it ought not to make other or further answer to said petition and amended petition other than to the part thereof so excepted herein, because the same are not sufficient in law, specifications of grounds of demurrer thereto having been made as aforesaid.

Wherefore defendant prays judgment, &c.

Defendant further says that should his demurrer to the entire petition and amended petition of plaintiffs be overruled, the said original and amended demurrer, and all the grounds and specifications thereof, are filed separately to all that part of plaintiffs' original and amended petition which is founded on alleged breach of contract for sidewalks included in the said ordinance of Aug. 19, 1873, and the amendment thereto of Oct. 21, 1873.

And, further, are filed separately to the same, except to so much of said petition and amended petition as sues for the value of actual
151 materials furnished and work and labor done.

And, further, are filed separately to all that part of plaintiffs' original and amended petition which is founded on alleged breach of contract for sidewalks included in the said ordinance of Feb. 3, 1874.

And, further, are filed separately to the same, except to so much of

said petition and amended petition as sues for the value of actual materials furnished and work and labor done.

On all of which demurrers, in their due order, defendant prays judgment.

(The foregoing defendant's demurrer endorsed as follows, to wit:) Filed Feb'y 17th, 1875. C. Dart, clerk.

Order.—From the minutes, December term, 1874; *February 17th*, 1875.

D. G. HITCHCOCK & CO. }
vs. } 863.
THE CITY OF GALVESTON. }

This day came the plaintiffs herein, D. G. Hitchcock & Co., by their attorney, and the defendant, The City of Galveston, appearing by
152 its attorneys, then came *came* on to be heard the demurrer of the plaintiffs to the first plea in abatement of the defendant, and the said demurrer having been heard and considered by the court, is overruled; to which ruling of the court the plaintiffs, by their counsel, excepts. Upon application, leave is granted the plaintiffs to amend, and the amendment filed; and, upon like application, leave is granted the defendant to amend. Then came on to be heard the defendant's demurrer to the plaintiffs' petition, and was argued before the court by counsel for the defendant, and the argument not being concluded, the further hearing of the case was postponed until to-morrow.

Order.—From the minutes, December term, 1874; *February 18th*, 1875.

Ordered, that an attachment issue to compel the attendance forthwith, before the court, of R. P. Boyce, to testify in the suit No. 863, Hitchcock et al. v. The City of Galveston, it appearing to the
153 court that he has been personally served with subpœna and has failed to appear.

Attachment for witness.

UNITED STATES OF AMERICA,
Eastern District of Texas:

To the marshal of said district, greeting:

You are hereby commanded to attach R. P. Boyce, of the city of Houston, if found in said district, and him safely keep, so that you have him before our honorable circuit court of the United States of America for the eastern district of Texas, at the city of Galveston, forthwith, then and there to testify in case No. 863, entitled "D. G. Hitchcock & Co. vs. City of Galveston."

And have you then and there this writ, certifying how you have executed the same.

Witness the honorable Morrison R. Waite, Chief-Justice of said court, and the seal thereof, at Galveston, this 18th day of February, in
154 the year of our Lord eighteen hundred and seventy-five, and of American Independence the ninety-ninth year.

[SEAL.]

C. DART,
Clerk E. D. T., G.,
By GEO. C. RIVES,
Dep.

Marshal's return.

Received Feb'y 19th, 1875, and executed Feb'y 19th, 1875, by arresting the within-named B. P. Boyce and bringing his body into court, as within directed.

L. D. EVANS,
U. S. Marshal E. D. T.,
By JOHN CLEMON,
Deputy.

(Endorsed as follows, to wit:) Returned and filed Feb'y 23, '75. C. Dart, clerk, by James Spann, deputy.

Order.—From the minutes December term, 1874; *February 18th*, 1875.

D. G. HITCHCOCK & Co.
vs.
THE CITY OF GALVESTON. } 863.

On this day again came the parties to this suit, by their attorneys, and thereupon the argument on the demurrer of the defendant was resumed, and the same not being concluded, the further hearing of the case was postponed until to-morrow.

155 *Order.—From the minutes, December term*, 1874; *February 19th*, 1875.

D. G. HITCHCOCK & Co.
vs.
THE CITY OF GALVESTON. } 863.

On this day again came the parties to this suit, by their attorneys, and the argument upon the defendant's demurrer to the plaintiffs' petition having been resumed, was concluded. Then came a jury of good and lawful men, to wit: C. H. Allen, Anthony Winston, E. R. Stapp, S. S. Firth, John White, G. Long, James Wilson, W. E. Kimball, E. F. Gray, A. P. Gray, H. S. Allen, and D. F. Myers, who, being duly tried, impaneled, and sworn, thereupon came on to be tried the issue joined between the parties, upon the plea of the defendant to the jurisdiction of the court in this cause; and the pleadings upon such issue having been presented, evidence was produced, and the evidence thereon not being concluded, the further hearing of the case was postponed until to-morrow.

156 *Subpœ. for F. D. Mitchell.*

The President of the United States of America to the marshal of the eastern district of Texas, greeting:

You are hereby commanded to summon Frank D. Mitchell to be and appear before the honorable circuit court of the United States for the eastern district of Texas, at the court-house in the city of Galveston, forthwith, to testify in behalf of defendant in case No. 863, D. G. Hitchcock & Co. v. City of Galveston, and not to depart the court without leave of the court.

Herein fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and seal of the said circuit court, at

the city of Galveston, this 20th day of February, in the year of our Lord one thousand eight hundred and seventy-five.

C. DART,
Clerk E. D. T., at Galveston.

157 *Marshal's return.*

Received this writ on the 20th day of February, 1875, and executed the same on the 22nd day of February, 1875.

L. D. EVANS,
U. S. Marshal E. D. T.,
By M. K. CANFIELD,
Deputy.

(Endorsed:) Returned & filed Feb'y 23,' 75. C. Dart, clk, by James Spann, deputy.

Defendant's amended answer.

D. G. HITCHCOCK & CO.
vs.
THE CITY OF GALVESTON.

For further and amended answer and defence to plaintiffs' suit, not waiving the pleas in abatement or demurrers herein, but expressly saving and relying thereon, this defendant, with leave of the court, says: That no advertisement for bids or proposals to fill up, grade, pave, and curb any sidewalks whatever was ever made by the mayor and the chairman of the committee on streets and alleys.

That the only advertisement ever attempted or pretended to have been made under the ordinances of the city council of said city of Gal-
158 veston, annexed to and made part of Answer or Plea No. 6, heretofore filed by defendant, were as follows, to wit:

Notice. Notice.

To contractors.

MAYOR'S OFFICE, GALVESTON, TEXAS,
January 14th, 1874.

Proposals will be received at this office until Monday, February 16, 1874, at 12 o'clock m.—

To fill up to the grade and pave the sidewalks on the following streets, where the same have not been filled and paved by the property-owners:

Strand, Mechanic, and Post-Office streets, each between Eighteenth and Twenty-fifth; also, Market street from Eighteenth to Thirty-third streets.

Nineteenth, Twentieth, Twenty-first, Twenty-second, Twenty-third, and Twenty-fourth streets, each between Strand and Post-Office streets.

Also, on the west side of Eighteenth street, and on the east side of Twenty-fifth street, each between Strand and Post-Office streets.

159 The sidewalks to be constructed of either of the following-named materials, viz: Asphalt, hard bricks laid in a bed of Portland cement and properly grouted; concrete made of Portland cement mixed with other proper materials; or with tile or stone laid in a bed of Portland cement; and the curbing around the same shall be made of the best hard brick, laid in Portland cement, and capped with a plank of heart-pine three inches in thickness and twelve inches wide, properly fastened to the curbing with the necessary iron bolts.

The work to be paid for in bonds of the city of Galveston, styled "Galveston city bonds for sidewalk improvement," running fifteen years, bearing ten per cent. interest per annum, payable semi-annually.

Specifications of the work for which proposals are invited will be prepared by the city engineer, and can be seen by calling at this office.

Any other information desired will be furnished.

160 The city reserves the right to reject any and all bids.

C. W. HURLEY, *Mayor.*

jA 15 1 m:

Notice. Notice.

To contractors.

MAYOR'S OFFICE, GALVESTON, TEXAS,
February 5th, 1874.

Proposals will be received at this office until Monday, February 16, 1874, at twelve o'clock m.—

To fill up to the grade, curb, and pave the sidewalks on the following streets, where the same have not been filled and paved by the property-owners:

On both sides of Avenues B, C, and E, east from Eighteenth street to Twelfth street, and west from Twenty-fifth street to Thirty-third street; and on both side of Avenue D from Eighteenth street to Twelfth street; and on both sides of Avenues F, G, H, I, & J, from Twelfth street to Thirty-third street; and on both sides of Twelfth, Sixteenth, Twentieth, Twenty-fourth, Twenty-eighth, and Thirty-third streets, from Avenue J (or Broadway) to Avenue B, (or Strand.)

161 The said sidewalks to be curbed with cypress-wood, stone, or brick, and a pavement six feet in width to be laid in the centre of the same, and to be composed of either asphalt, hard bricks laid in Portland cement and grouted, concrete made of Portland cement and other proper materials, tiles, or stone.

The work to be paid for in bonds of the city of Galveston, styled "Galveston city bonds for sidewalk improvement," running fifteen years, bearing ten per cent. interest per annum, and payable semi-annually.

Specifications of the work for which proposals are invited will be prepared by the city engineer, and can be seen by calling at this office.

Any other information desired will be furnished.

The city reserves the right to reject any and all bids.

C. W. HURLEY, *Mayor.*

FE. 7. 10. t.

Which said first advertisement was published in the Galveston
162 Daily News, commencing January 15, 1874, and continued in said Daily News until the 16th of February ensuing, though said News was not published, nor was said advertisement published, on any Monday during that period of time.

The second advertisement was published in said Daily News, commencing February 7th, and continued until February 16th, 1874, except on Mondays as aforesaid, and no other advertisement for bids or proposals relating to the improvements of sidewalks in said city was ever made; and defendant alleges that no advertisement having been made by said mayor and chairman of the committee on streets and alleys as required by the said ordinance approved August 19th, 1873, they had no power or authority to make the contract sued on relating to the sidewalks set forth and specified in said ordinance.

said for $250,000, and no authority ever given or attempted to be given for any other bonds; and defendant becoming satisfied that it had no lawful authority to issue bonds for sidewalk improvements; that
170 its attempted delegation of authority to make contracts was unlawful and void; and that the contract made with plaintiffs was in excess and in violation of all authority and power given or attempted to be given to said mayor and chairman; this defendant declared the said contract null and void, as in fact and law it was, and it was their duty to do.

And defendant annexes hereto, marked "No. 6," and makes part of this petition, one of the plate or form of bonds referred to in said contract with plaintiffs, being the only bonds in existance, or ever in any manner attempted to be authorized by defendant.

And this defendant denies all and singular the allegations in plaintiffs' original and amended petition, not herein expressly admitted to be true.

All which it is ready to verify.

Wherefore it prays judgment, &c.

WALTER L. MANN, *City Att'y.*
BALLINGER, JACK & MOTT,
FLOURNOY, SHERWOOD & SCOTT,
Counsel for Defendant.

171 *No. 5, annexed to preceding plea.*

To the hon. mayor and chairman of the committee on streets and alleys:

GENTLEMEN: We respectfully submit the following proposals for filling up, grading, curbing and paving the sidewalks in the city of Galveston, ordered by ordinance of the city council, viz:

All uncompleted sidewalks within the fire limits, and the walks upon avenues B, C, D, E, F, G, H, I, J, and upon Twelfth, Sixteenth, Twentieth, Twenty-fourth, Twenty-eighth, and Thirty-third streets. The work to be done in strict accordance with the specifications of the city engineer, and the terms specified in your advertisement for proposals.

Asphalt in bulk, rolled to 3 inches thick, solid, per square yard	1.75
Texas paving-brick in bed of cement & grouted, p'r squar' y'd	2.35
Compressed paving-brick in bed of cement & grouted, per square yard	2.50
English tile in bed of cement & grouted, per square yard	3.25
172 Portland cement concrete, p'r square yard	4.50
North River flag-stone " " "	6.00
Grading & filling, tamping & rolling, per cubic yard	1.25
Brick-curbing, per cubic foot	.95
Coping, wood-coping and iron bolts, per leinial foot	.35
Curbing, wood-curbing of 3-inch red cypress per sup. *of* foot	.45
Wood-curbing of 1 x 6 flooring, per leinial foot	.09

Your obedient servants,

D. G. HITCHCOCK & CO.

GALVESTON, TEXAS, *Feb'y 16th*, 1874.

I certify that the above and foregoing is a true copy of original proposal or bid on file in this office, with the contract of D. G. Hitchcock & Co.

[SEAL.]

C. C. ALLEN,
City Clerk.

The foregoing "amended answer" of defendant endorsed as follows, to wit: "Filed Feb'y 20, 1875. C. Dart, clerk."

172½ An ordinance authorizing the issuance and sale of two hundred and fifty thousand dollars of the bonds of the city of Galveston, for the purpose of improving sidewalks, by filling, raising, paving, and curbing the same.

Be it ordained by the city council of the city of Galveston:

SECTION 1. That the mayor of the city of Galveston be, and he is hereby, authorized to have printed or engraved coupon-bonds of the city of Galveston, to the extent of two hundred and fifty thousand dollars, to be styled "Galveston city bonds for sidewalk improvement," and to draw interest from date of their sale or disposition, at the rate of ten per cent. per annum till paid. The interest on said bonds shall be paid semi-annually, on the 1st days of March and September of each year, at the office of the city treasurer, and this shall be so expressed by coupons attached thereto. The principal of said bonds when due or redeemable, as hereinafter provided, shall also be paid at the office of the treasurer of the city of Galveston.

SEC. 2. That the bonds hereby and herein authorized to be issued and sold shall bear the date respectively of the day upon which they are sold or disposed of, and they shall be due or payable fifteen years from their date: provided, however, that the city council shall have the right, and such right is herein and hereby expressly reserved and retained, to redeem at par any and all of the said bonds at any time after five years from their sale or disposition.

SEC. 3. That the city council, when it shall determine to redeem any of the said bonds, as provided for in the preceding section, shall instruct the city treasurer to give notice for twenty consecutive days, by publication in the official journal of the city of Galveston, that at the next succeeding day or period (after the notice) provided herein for the payment of the semi-annually-maturing coupons attached to said bonds, he will redeem the bonds described in the said notice; and the said bonds shall be redeemed in the order of their issuance; that is to say, those first issued or bearing the oldest date shall be redeemed first, and they shall be particularly described by number, date, and amount in the said notice.

SEC. 4. That the holders or owners of any bonds that are advertised for redemption and described in the said notice in manner as aforesaid, shall, upon the day appointed and designated in the said notice, present the same to the city treasurer for redemption and payment; and any and all bonds advertised for and described in any of said notices, which shall not be presented for redemption and payment upon the day specified and designated in the said notices, shall cease to bear interest from that day and date.

SEC. 5. That the bonds herein authorized to be issued and sold or disposed of shall be numbered in rotation from one up, and shall be issued in sums of one hundred dollars, or any multiple thereof, not to exceed the sum of five thousand dollars. They shall be payable to or bearer, and shall be signed by the mayor and countersigned by the city treasurer and recorded in the office of the city clerk, in a book to be kept specially for that purpose; and there shall be affixed to the said bonds the corporate seal of the city of Galveston.

SEC. 6. That in order to provide for the semi-annually-accruing interest on the said bonds, and to create a sinking-fund to pay the principal of the said bonds at their maturing or when they are redeemed, there is hereby appropriated all the sums of money realized from assessments made on the property abutting or fronting upon the sidewalks improved by means of the sale or other disposition of said bonds; and

all sums of money so assessed and collected shall be paid to the city treasurer, who shall pass and place the same to the credit of a fund to be styled "Interest and sinking fund of Galveston city bonds for sidewalk improvement." The fund so created and accumulated shall be deemed a special fund, and shall be used solely and exclusively for paying the interest and principal of the bonds herein authorized to be issued and disposed of.

SEC. 7. That the application of any portion of the special fund created by the preceding section in any manner other than therein provided for shall entail upon the officers of the city misappropriating said special fund all the pains and penalties contained in and imposed by section 4, article 3, title 4, of the charter of the city of Galveston.

SEC. 8. That the mayor and the chairman of the committee on streets and alleys shall provide for the sale, negotiation, and disposal of the bonds herein and hereby authorized to be issued and disposed of.

SEC. 9. That this ordinance shall take effect and be in force from and after its passage.

Approved August 19th, 1873.

C. W. HURLEY, *Mayor.*

Attest:

C. C. ALLEN, *Clerk.*

City of Galveston ten per cent. sidewalk improvement bond.

No. . $. Issued , 18 , to . Payable , 18 . No. of coupons, .

Interest payable on the first days of March and September, at the treasurer's office in the city of Galveston.

Filed Feb'y 20, '75.

C. DART, *Clk,*
By GEO. C. RIVES, *Dep.*

173 No. 44.

Telegram from Hitchcock to Hume.

Half-rate messages.

The Western Union Telegraph Company require that all messages received for transmission shall be written on the blanks of the company, under and subject to the conditions printed thereon, which conditions have been agreed to by the sender of the following half-rate message:

WILLIAM ORTON, *Pres't.*

GEO. H. MUMFORD, *Sec'y.* 5 o'c.

Dated Hannibal, Mo., 15, 1874.
Received at .

To A. Cha's Hume, att'y law:

Arrived here safe this afternoon; will be in Monmouth early Monday morning;

D. G. HITCHCOCK.

12 p'd ½.

(Endorsed:) Filed Feb'y 20th, 1875. C. Dart, clerk, by Geo. C. Rives deputy.

174 *Verdict as to citizenship of Hitchcock.*

We, the jury, find, in the case of Dexter G. Hitchcock, that on the 16th day of November, 1874, he was a citizen of the State of Illinois.

D. F. MYERS, *Foreman.*

(The foregoing verdict endorsed as follows, to wit:) Filed Feb'y 20, '75. C. Dart, cl'k.

Verdict as to citzenship of J. W. Byrnes.

We, the jury, find, in the case of James W. Byrnes, that on the 16th of November, 1874, he was a citizen of the State of Louisiana.

D. F. MYERS, *Foreman.*

(The foregoing verdict endorsed as follows, to wit:) Filed Feb'y 20, '75. C. Dart, cl'k.

175 *Order.—From the minutes.*

December term, 1874, *February 20th*, 1875.

D. G. HITCHCOCK & Co. *vs.* THE CITY OF GALVESTON. } 863.

On this day again came the parties to this suit, by their attorneys, and thereupon the trial of the issue joined between the parties, upon the plea of the defendant to the jurisdiction of the court in this cause, was resumed; and the jurors aforesaid duly impaneled and sworn, having heard the evidence upon the issue presented, and argument of counsel thereon, and the charge of the court, retired to consider of their verdict, and, after due deliberation, returned into court their verdicts, as follows:

"We, the jury, find, in the case of Dexter G. Hitchcock, that on the 16th day of November, 1874, he was a citizen of the State of Illinois.

"D. F. MYERS, *Foreman.*"

"We, the jury, find, in the case of James W. Byrnes, that on the 16th of November, 1874, he was a citizen of the State of Louisiana.

"D. F. MYERS, *Foreman.*"

Whereupon the further consideration of the case was postponed until Monday next, the 22d inst.

176 *Judgment.—From the minutes, December term* 1874, *February* 22 1875.

D. G. HITCHCOCK & JAMES W. BYRNES, PARTNERS, composing the firm of D. G. Hitchcock & Co., *vs.* THE CITY OF GALVESTON. } 863.

The demurrer by the defendant to the original and amended petition of the said plaintiff having been submitted to the court, and the court being now fully advised, because it seems to the court that the law

arising upon such demurrer is for the defendant, it is thereupon considered, adjudged, and ordered by the court that the said demurrer of the defendant be, and is hereby, sustained.

And the plaintiffs asked leave to amend their petition, which was granted by the court. And the said amendment having been filed, the demurrer of the defendant was renewed to the original and amended petitions, and was sustained by the court. And the plaintiffs not desiring to amend further, it is therefore considered, adjudged, and ordered by the court that the plaintiffs' original and amended
177 petitions be dismissed; that the plaintiffs, Dexter G. Hitchcock and James W. Byrnes, take nothing by their said suit, and go hence without day; and that the defendant, The City of Galveston, do have and recover of and from the said plaintiffs all costs about this suit expended, for which execution shall issue.

To which ruling and judgment of the court the plaintiffs then and there excepted, and notice was given by the plaintiffs, in open court, the defendant and counsel being present, of their intention to prosecute a writ of error to the judgment of the court.

Amended petition.—Filed Feb'y 22d, 1875.

U. S. C. C.

D. G. HITCHCOCK & CO.
v.
THE CITY OF GALVESTON. } No.

And now come the said plaintiffs and, amending their petition in said cause, say that at the time said contract was made with them various other contracts were made and executed by defendant with other parties for the paving of the sidewalks named in said petition with
178 the various materials; respectively therein named, conditioned each upon the choice and selection of the respective pavements therein named, just as is nominated in said contract as applicable to said asphalt pavement, and had not said contract been abrogated as alleged, each and every of said sidewalks would have been completed according to one or the other of the several modes of pavement adopted by the defendant.

That plaintiffs had prepared, and were ready with tools, materials, and labor to fabricate said asphalt pavement according to their contract, and had, in fact, made several contracts with citizens of the defendant to lay down said pavement, and had procured their consent to furnish them with a written statement thereof, to be filed in the mayor's office, whenever in the progress of the work the sidewalks were completed sufficently for the purpose of laying said pavement.

That it was their intention and object to lay down said pavement whenever it was chosen by the property-owners, or in their de-
179 fault indicated by the proper parties named and authorized thereto by defendant, and they competed with all other kinds of pavement as eagerly as they did for the other work named in the ordinances, and had said contract not been abrogated, they would have been able to procure the laying of the greater part of all of said sidewalks with their said pavement, and would have made a profit of fifty cents a square yard upon all of the pavement so laid.

That they did not select the parts of the work named in their original petition as the subject of recovery in this suit, because of its supposed

yield of a greater profit than the paving, but because they considered and were advised that the several qualities and kinds of work named were severable, and afforded the subject-matter of distinct and complete contracts.

That all of said contracts were abrogated as plaintiffs' was, and it became impossible to progress with the paving under either or any of them on account of said action of the defendant.

That said construction of the intent and meaning of the con-
180 tract adopted by plaintiffs was uniformly acted on by the defendant, and it was never at any time claimed by it, or any of its officers, or any of its citizens, that said contract of plaintiffs was entire and not susceptible of severance in the performance of its several parts, but on the contrary, said construction of plaintiffs has at all times been admitted and acted on by defendant, as the minutes of its council show.

Wherefore they say that they are entitled to proceed in their said suit as already brought.

F. CHARLES HUME,
Counsel for Plaintiffs.

(The foregoing amended petition, endorsed as follows, to wit:) Filed Feb'y 22d, 1875. C. Dart, cl'k.

181 *Order.—From the minutes, December term*, 1874; *February 22nd*, 1874.

D. G. HITCHCOCK & CO.
vs. } 863.
THE CITY OF GALVESTON.

The plaintiffs herein, through their council, having signified their intention to prosecute a writ of error to the Supreme Court of the United States from the judgment this day entered in this case, the said writ is allowed, and the bond to be executed by said plaintiffs to perfect said writ, is hereby fixed at the sum of five hundred dollars, with sureties to be approved by the clerk of this court.

Writ of error.—Filed Feb'y 23d, 1875.

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the judges of the circuit court of the United States, for the eastern district of Texas, greeting:

Because in the records and proceedings, and also in the rendi-
182 tion of a plea which is in the said circuit court, before you, between Dexter G. Hitchcock and James W. Byrnes, plaintiffs, and The City of Galveston, defendant, a manifest error hath happened, to the great damage of the plaintiffs, as by their complaint appears: We, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the said Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the second Monday in October, 1875, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the
183 laws of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, and the seal of the circuit court of the United States for the eastern district of Texas, at Galveston, on the 22nd day of February, A. D. 1875.

[SEAL.]

C. DART,
Clerk U. S. Circuit Court, E. D. T., G.

Allowed by—

W. B. WOODS,
U. S. Judge.

(The foregoing writ of error endorsed as follows:) Filed February 23rd, 1875. C. Dart, clerk U. S. circuit court E. D. T., G.

Bond for costs on writ of error.—Filed Feb'y 23d, 1875.

Circuit court of the United States for the eastern district of Texas.

Know all men by these presents that we, Dexter G. Hitchcock & James W. Byrnes, principals, and John B. Sydnor and William
184 B. Norris, sureties, are held and firmly bound unto the city of Galveston in the sum of five hundred dollars, to be paid to the said city of Galveston; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 23rd day of February, A. D. 1875.

Whereas the above-named Dexter G. Hitchcock and James W. Byrnes have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the eastern district of Texas, holding sessions at Galveston:

Now, therefore, the condition of this obligation is such that if the above-named Dexter G. Hitchcock and James W. Byrnes shall prose-
cute their writ of error to effect, and answer all costs if they shall
185 fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

DEXTER G. HITCHCOCK. [SEAL.]
J. W. BYRNES. [SEAL.]
JNO. B. SYDNOR. [SEAL.]
W. B. NORRIS. [SEAL.]

Sealed and delivered in presence of—

C. DART,
Clerk U. S. Circ't Court, E. D. T., G.

Approved:

W. B. WOODS,
U. S. Judge.

(The foregoing bond for costs on writ of error endorsed as follows:) Filed February 23d, 1875. C. Dart, clerk U. S. circ't court, E. D. T., G.

Citation in error.—Iss'd Feb'y 23d, 1875.

UNITED STATES OF AMERICA, *ss:*

To the city of Galveston, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second

Monday in October, 1875, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, wherein Dexter G. Hitchcock and James W. Byrnes are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

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Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and the seal of the circuit court of the United States for the eastern district of Texas, at Galveston, this 23d day of February, A. D. 1875.

[SEAL.]

W. B. WOODS,
U. S. Judge.

Marshal's return.

Received this writ February 23d, 1875, and executed the same on 25th February, 1875, by reading this, the original writ, to C. W. Hurley, mayor of Galveston City, and by personally handing to him a copy certified to by the clerk of the court.

L. D. EVANS, *U. S. Marshal,*
By M. K. CANFIELD, *Deputy.*

187 (Foregoing citation in error endorsed as follows:) Filed Feb'y 25th, 1875. C. Dart, clerk.

Copy of writ of error lodged for def'ts in error Feb'y 23d, 1875.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the eastern district of Texas, greeting:

Because in the records and proceedings, and also in the rendition of a plea which is in the said circuit court, before you, between Dexter G. Hitchcock and James W. Byrnes, plaintiffs, and The City of Galveston, defendant, a manifest error hath happened, to the great damage of the plaintiffs, as by their complaint appears: We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the said Supreme Court of the United States, to-

188 gether with this writ, so that you may have the same at Washington on the second Monday in October, 1875, in the said Supreme Court to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, and the seal of the circuit court of the United States for the eastern district of Texas, at Galveston, on the 22nd day of February, A. D. 1875.

[SEAL.]

C. DART,
Clerk U. S. Circuit Court E. D. T., G.

Allowed by

W. B. WOODS,
U. S. Judge.

A true copy of the original writ of error issued in said cause. I certify.

189 Witness my hand and the seal of said circuit court at Galveston, this 23d day of Febr'y, 1875.

[SEAL.]

C. DART, *Clk*,
By GEO. C. RIVES, *Dep.*

(Foregoing copy of writ of error endorsed as follows:) Filed Febr'y 23d, 1875. C. Dart, clerk, by Geo. C. Rives, dep.

190 In the circuit court of the United States for the eastern district of Texas.

I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, at Galveston, do hereby certify the foregoing one hundred and eighty-nine (189) pages of writing to contain a true copy of the record, and of all proceedings in the cause lately pending in said court, numbered 863, on the law docket of said court, entitled D. G. Hitchcock & Co. v. The City of Galveston, as the same now appear on file and of record in my office.

To certify which, witness my hand and seal of said court, at Galveston, April 16, 1875.

[SEAL.]

C. DART,
Clerk U. S. Circ't Court E. D. T. G.

191 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the eastern district of Texas, greeting:

Because in the records and proceedings, and also in the rendition of a plea which is in the said circuit court, before you, between Dexter G. Hitchcock and James W. Byrnes, plaintiffs, and The City of Galveston, defendant, a manifest error hath happened, to the great damage of the plaintiffs, as by their complaint appears: We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the said Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday in October, 1875, in the said Supreme Court to be then

192, 193 and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, and the seal of the circuit court of the United States for the eastern district of Texas, at Galveston, on the 22d day of February, A. D. 1875.

[SEAL.]

C. DART,
Clerk U. S. Circuit Court E. D. T., G.

Allowed by—

W. B. WOODS,
U. S. Judge.

194 (Indorsed:) C. L., 863. D. G. Hitchcock & Co. v. The City of Galveston. Writ of error. Filed February 23d, 1875. C. Dart, clerk U. S. circ't court E. D. T., G.

195 UNITED STATES OF AMERICA, *ss:*

To the city of Galveston, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday in October, 1875, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, wherein Dexter G. Hitchcock and James W. Byrnes are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and the seal of the circuit court of the United States for the eastern district of Texas, at Galveston, this 23d day of February, A. D. 1875.

[SEAL.]

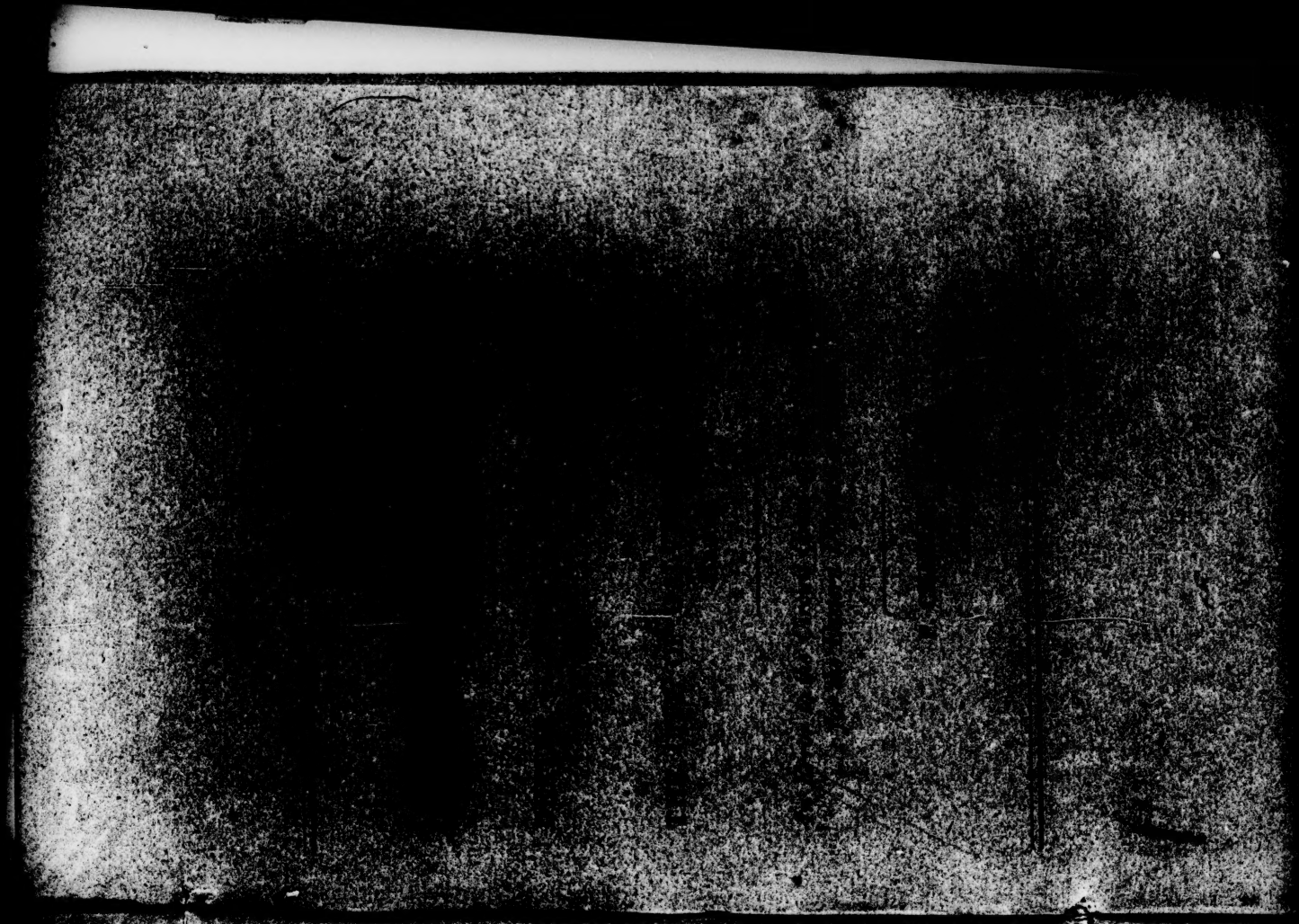
W. B. WOODS,
U. S. Judge.

196 (Indorsed:) C. L. 863. D. G. Hitchcock & Co. v. The City of Galveston. Citation in error. Filed Feb'y 25th, 1875. C. Dart, clerk.

Received this writ February 23d, 1875, and executed the same on 25th February, 1875, by reading this the original writ to C. W. Hurley, mayor of Galveston City, and by personally handing to him a copy certified to by the clerk of the court.

L. D. EVANS,
U. S. Marshal,
By M. K. CANFIELD,
Deputy.

(Indorsement on cover:) No. 153. Dexter G. Hitchcock and James W. Byrnes, plaintiffs in error, vs. The City of Galveston. E. Texas C. C. U. S. Filed 4th October, 1875.



Supreme Court of the United States.

No. 158.

DEXTER G. HITCHCOCK AND JAMES W. BYRNES, PLAINTIFFS IN ERROR,

vs.

THE CITY OF GALVESTON, DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

STATEMENT OF THE CASE.

On the 16th of November, 1874, the plaintiffs, as partners under the firm style of D. G. Hitchcock & Co., brought their suit in the Circuit Court of the United States for the Eastern District of Texas, at Galveston, against the City of Galveston, a municipal corporation chartered and incorporated under

the laws of Texas, for damages, claimed to have resulted to plaintiffs from the failure of the city to execute, on its part, and its refusal to allow plaintiffs to execute on their part, a contract made between the parties on the 28th of February, 1874, whereby the plaintiffs undertook to fill, grade, tamp, roll, curb and pave certain sidewalks in the city, at specified rates for each description of work undertaken, in consideration of bonds of the city, styled "Galveston City Bonds for Sidewalk Improvements," to be delivered to plaintiffs and taken by them at par therefor.

It was alleged that the contract on the part of the city was made "through its proper officers and agents, C. W. Hurley, Mayor of said city, and J. C. Ogle, Chairman of the Committee of Streets and Alleys of the council thereof, witnessed by C. C. Allen, its clerk," in pursuance of various ordinances of the city, authorising said contract to be made in that form. These ordinances were referred to by numbers and dates.

The contract was attached to the petition as "Exhibit A." (Transcript, pp. 5, 6 and 7.) It bound the city, in substance:

1. To pay plaintiffs in said bonds, at par, $1 75 per square yard of *asphalt* pavement, of a certain named description, laid by them on the sidewalks

specified in the contract. Certain of these sidewalks were to be paved only in the centre thereof —the pavement to cover but six feet in breadth: The right of the plaintiffs to lay this *pavement* was qualified by a proviso—*following immediately the promise of the city to pay for said pavement*—in these terms:

Provided, however, That the said D. G. Hitchcock & Co. obtain the written consent of the owners of the property fronting or abutting upon the said sidewalks to the laying down of the said pavement, which written consent or selection of said pavement shall be filed in the Mayor's office with the city clerk.

2. To pay plaintiffs in said bonds, at par, $1 25 per cubic yard of *filling* "necessary and needed to be done upon any and all of the said sidewalks preparatory to the laying of *any* pavement thereon." Said price "to include and cover not only the filling, but the grading, tamping and rolling."

3. To pay plaintiffs in said bonds, at par, forty-five cents per square foot of wooden (red cypress) *curbing*, "that may be needed or used in filling up and grading the said sidewalks preparatory to the putting down of the said pavement, *or any other*."

4. To pay plaintiffs in said bonds, at par, nine cents per lineal foot of wooden curbing necessary for the laying of "*any* pavement" upon the six-feet sidewalks.

The plaintiffs bound themselves "to lay down

and fabricate the said pavement in the manner and style above set forth and stipulated; and * *also* * to fill, grade, tamp, roll and curb the said sidewalks as * stipulated."

The work was to be done in accordance with specifications of the City Engineer, filed in the Mayor's office. Weekly estimates were to be made by the engineer of the work as it progressed, "and when the amount or quantity *finished* or *completed*" should, at the price agreed on, "*amount to the sum of* $5000," that sum in said bonds, at par, was to be paid to plaintiffs.

The plaintiffs allege that at great expense they immediately made preparations and began work under the contract, and continued it for forty-six days in good faith, when defendant, by its corporate action, declared said contract null and void, and with force and arms compelled plaintiff to desist from their said work; that relying upon the covenants of defendant they had made various contracts of great magnitude with third parties for the necessary labor and materials for the execution of said work, and in consequence of defendant's said wrongful acts, were compelled to undergo the vexations and expenses of litigation instituted and threatened against them by said third parties, because of their (plaintiffs') inability to perform their engagements with them; that the pretended annul-

ment of said contract was not notified to plaintiffs until long after their preparation to carry the work forward had been made and said expenses incurred and obligations assumed; nor until defendant had approved, ratified and confirmed said contract by the adoption of the report of a committee of its council, appointed by a resolution thereof to investigate said contract and report thereon—said committee having reported that the contract was valid and subsisting; nor until defendant had repeatedly ratified and confirmed the same; that plaintiffs had actually completed under the contract *curbing* and *filling* of the value of $18,193 63$_{100}$, and when restrained from further work were ready, willing, and offered to finish the entire *filling*, *curbing* and *edging* upon said sidewalks, other than that already completed and in process of completion, whereby they would have fairly realized a profit in the aggregate, $127,990 54$_{100}$; that by reason of the said wrongful acts of defendant plaintiffs had lost all their large investments made in good faith for the performance of said contract, had their business ruined, and in fortune and estate suffered irreparable damage. Exhibits were attached to the petition showing the particulars of plaintiffs' claim, and prayer was made for judgment for $18,193 63$_{100}$ due for work actually done, and for $127,990 57$_{100}$ profits lost by defendant's failure to perform the contract.

To this petition defendant filed, on the 16th of December, 1874, a lengthy answer, the only issues whereof necessary, or proper, to he noticed here being those of law raised by demurrer. (Transcript pp. 10 and 11.) These are supposed to be resolvable substantially into the following propositions:

1. That the petition states no cause of action; because,

(*a*) It does not appear therefrom that the defendant could lawfully make a contract involving the issuance of bonds for sidewalk improvements.

(*b*) It does not appear therefrom that the Mayor and Chairman of the Committee on Streets and Alleys had legal authority to make the contract on behalf of the defendant.

(*c*) It does not appear therefrom that plaintiffs had complied with the *proviso* of the contract requiring the written consent of the property owners to the laying of the asphalt pavement.

2. That the ordinances claimed to authorize the contract are not exhibited, by pleading, to the court.

3. That the allegations of indorsement, approval and ratification of the contract by defendant are not sufficiently specific as to facts.

4. That the allegations of the loss of profits by the defendant's failure to perform the contract disclose no ground for the relief sought thereby.

On the 17th of February, 1875, the plaintiffs filed an amendment to their petition (Transcript, pp. 34, 35 and 36) exhibiting the several ordinances relied upon as authorizing the contract, and also the one authorizing the issuance of the bonds named therein.

The first of these ordinances is numbered 21, and entitled, "An Ordinance to provide for the filling up, grading and paving of certain sidewalks, and to curb the same." (Transcript, pp. 36, 37 and 38.) It authorizes and *directs* the Mayor and the Chairman of the Committee on Streets and Alleys to make "a contract or contracts with responsible parties to fill up, grade, pave and curb certain sidewalks"—a part of those named in the contract—and to this end to advertise for bids for thirty days to do the work, "*in part or in whole.*"

It provides that the *pavement* shall be either of "*asphalt, brick, or concrete stone made by the use of Portland cement.*"

It gives the right to the owners of the majority of the frontage *in each separate block* abutting on any sidewalk thereof to select at any time before bids for the work are received "*which of the said materials*" they prefer to be used in the construction of the *pavement* on said sidewalk; and in default of such selection the Mayor and Chairman of the Committee on Streets and Alleys are directed

to determine the material to be used for *that* purpose.

It further provides that the cost of filling, raising, curbing and paving each sidewalk shall, "*as soon as the same shall be finished and completed*," be a charge against the property abutting thereon, and assessed against the same in a manner indicated by the ordinance, and directs that said assessments, after approval and acceptance by the City Council, etc., shall be "placed *in the hands of the City Collector for collection*"—the assessments being payable in five annual installments drawing ten per cent. interest from date of assessment. The first installment of the assessment is declared not to be due *until the sidewalk is completed*, and annually thereafter the remaining installments mature.

This ordinance was passed the 19th of August, 1873.

The second ordinance, numbered 26, passed the 21st of October, 1873, (Transcript, p. 38) and merely amends the one just referred to, by changing in some particulars the description of materials to be used in paving and curbing, and providing for sixty days' notice to property owners to do the work contemplated, and upon their failure to do it devolving the duty on the Mayor and Chairman of Committee on Streets and Alleys to have it done, as directed by the first ordinance.

The third ordinance, numbered 37, passed 3d Feb., 1874, (Trans., pp. 39 and 40) provides for the filling, grading, curbing and paving of certain other sidewalks, named in the contract, in a manner and with materials specified—the pavements to be six feet wide and in the centre of the sidewalks, and "composed of *either* asphalt, hard brick laid in Portland cement and grouted, concrete made of Portland cement and other proper materials, tiles or stone."

Like authority to that conferred upon them by the first ordinance, (No. 21) is given to the Mayor and Chairman of Committee on Streets and Alleys to make "*contract or contracts*" for the work contemplated, and a similar mode is prescribed for the assessment and collection of the cost, except that the installments extend over a period of ten, instead of five years from the *completion* of the sidewalks.

The fourth ordinance, passed 19th August, 1873, (Transcript, pp. 40 and 41) authorizes "the issuance and sale of two hundred and fifty thousand dollars of the bonds of the City of Galveston, for the purpose of improving sidewalks by filling, raising, pav ing and curbing the same."

The bonds to be payable to —— or bearer, to be dated when sold—to bear ten per cent. interest, payable semi-annually—to be due fifteen years from their dates, respectively, and redeemable at par, at

the option of the city, at any time after five years from the dates, respectively, of their sale.

To meet the accruing interest, and create a sinking fund to discharge the principal of these bonds, the ordinance appropriates "all the sums of money realized from assessments made on the property abutting or fronting upon the sidewalks *improved by means of the sale or other disposition of the bonds.*" The Mayor and the Chairman of the Committee on Streets and Alleys are charged by the ordinance with the duty of making disposition of the bonds.

The amended petition repeats the plaintiffs' original allegations of ratification of the contract by defendant, and specially avers such ratification in the following terms (Transcript p. 35):

And, further amending, plaintiffs say that the report of a committee of defendant, alleged in their original petition to constitute a ratification, confirmation, and approval of said contract, was made on the 28th of March, 1874, to the City Council of defendant, in pursuance of a resolution thereof passed the same month, and is of record in the archives and official papers of defendant, and it is charged with notice of the contents thereof, and is notified to produce the same in court; that said committee, composed of Aldermen Hennessey, Sealy and Mosebach of said council, report said contract to have been improvidently entered into "in some particulars" by the contracting parties on the part of the city, but find no other fault with it, and recommend that work proceed substantially under its terms, and report an ordinance to that effect, (No. 3) amending the first and second sections of said ordinance No. 37, but leaving un-

changed the third section thereof wherein is contained the authorization to the Mayor and Chairman of the Committee on Streets and Alleys to make said contract; that at the same meeting of said council a minority report was made by a member of said committee under said resolution of 24th March, which is also of record in defendant's archives and here required to be produced in court, declaring said contract to be null, void and *ultra vires;* that upon consideration and discussion of said reports the majority report was adopted by the council, and the ordinance reported therewith read first time under the rules; that by the terms of the 27th standing rule of said council "the adoption of a report is equivalent to an indorsement of its contents;" that the said proceeding resulting as aforesaid in the adoption of said majority and the rejection of said minority report, indorsed, approved, ratified, and confirmed the said contract as the act and deed of defendant.

And plaintiffs show that thereafter, upon a memorial by its citizens protesting against said contract with plaintiffs, defendant appointed a committee of its council, consisting of Aldermen Chapman, Sealy and Hennessy, to meet a committee of said citizens in consultation upon and about said contract, and in said consultation to represent the thought, sentiment and wishes of the City Council as a government upon that subject, and to speak and act in its behalf; that in said consultation held early in April, 1874, said Aldermen in their capacity as representatives of the City Council, severally and together, declared that said contract with plaintiffs was lawful and binding upon the parties thereto; and thereby defendant ratified, confirmed, and pronounced valid the said contract with plaintiff. And plaintiffs allege as in their original petition, that repeatedly after the execution of said contract it was ratified and confirmed as its act and deed by defendant and its said officers and agents. And plaintiffs show that in fact the said ordinances under which the said contract was made, have never been repealed by de-

fendant, and the same are now in full force; and that as late as, and upon, the 16th Feb., 1875, one of said ordinances (No. 37, approved 3d Feb., 1874), was expressly recognized by defendant as in force in a regular meeting of its council upon that date by the formal consideration of an amendment thereto by said council, as appears from the proceedings thereof.

It is further averred by the amendment (Transcript, p. 36) as follows:

And, further amending, plaintiffs say that the uniform usage and business custom of defendant in respect to the making of contract for all purposes whatsoever, was, at and before the date of said contract herein sued on, and, as they are informed and believe, still is to direct their execution by and through committees thereto empowered and appointed by the council,and intrusted with full power and discretion concerning the terms and conditions thereof, in the same manner and to thes ame degree prescribed and indicated by the said council inrespect to the said contract of plaintiffs; that during theentire corporate existence of defendant no other general mode of making contracts by it has ever been known or pursued,and its official records disclose no exception whatsoever to said mode, unless occurring under circumstances showing action by some one not authorized by defendant thereto, in which said exceptional instances defendant has sometimes, but not always, executed by its Council acts of ratification thereof; that said custom has prevailed so long, and has been and is so universal, that defendant is estopped to assert the invalidity of contracts made with it in conformity therewith, and especially the contract sued on.

The defendant renewed its several demurrers, in substance, to the original petition and amendments —"except so much thereof as sues for the value of

work and labor actually done and materials furnished to the city of Galveston." (Transcript, pp. 41 and 42.)

This being the state of the record, the court on the 22d of February, 1875, rendered its judgment sustaining the demurrer to the petition. Thereupon, (to meet objections indicated by the Court's opinion) plaintiffs obtained leave to, and did, file a further amendment, in the following terms (Transcript pp. 52, 53 and 54):

And now come the said plaintiffs and, amending their petition in said cause, say that at the time said contract was made with them various other contracts were made and executed by defendant with other parties for the paving of the sidewalks named in said petition, with the various materials, respectively, therein named, conditioned each upon the choice and selection of the respective pavements therein named, just as is nominated in said contract as applicable to said asphalt pavement, and had not said contract been abrogated as alleged, each and every of said sidewalks would have been completed according to one or the other of the several modes of pavement adopted by defendant.

That plaintiffs had prepared, and were ready with tools, materials, and labor to fabricate said asphalt pavement according to their contract and had, in fact, made several contracts with citizens of the defendant to lay down said pavement, and had procured their consent to furnish them with a written statement thereof, to be filed in the Mayor's office, whenever in the progress of the work the sidewalks were completed sufficiently for the purpose of laying said pavement.

That it was their intention and object to lay down said pavement, whenever it was chosen by the property owners,

or in their default indicated by the proper parties named and authorized thereto by defendant, and they competed with all other kinds of pavements as eagerly as they did for the other work named in the ordinances, and had said contract not been abrogated, they would have been able to procure the laying of the greater part of all of said sidewalks with their said pavement, and would have made a profit of fifty cents a square yard upon all of the pavement so laid.

That they did not select the parts of the work named in their original petition, as the subject of recovery in this suit, because of their supposed yield of a greater profit than the paving, but because they considered and were advised that the several qualities and kinds of work named were severable and afforded the subject matter of distinct and complete contracts. That all of said contracts were abrogated as plaintiffs' was, and it became impossible to progress with the paving under either or any of them on account of said action of defendant.

That said construction of the intent and meaning of the contract adopted by plaintiffs was uniformly acted on by the defendant, and it was never at any time claimed by it, or any of its officers, or any of its citizens, that said contract of plaintiffs was entire and not susceptible of severance in the performance of its several parts, but on the contrary, said construction of plaintiffs has at all times been admitted and acted on by defendant, as the minutes of its council show. Wherefore they say they are entitled to proceed in their suit as already brought.

The defendant's demurrer being again interposed to the petition as amended, was sustained by the court, and, plaintiffs declining further to amend, it adjudged that their petition be dismissed; whereupon they excepted to the ruling and judgment of the court (Transcript, p. 53), and the cause is now

here upon error prosecuted by them to said judgment.

ERROR ASSIGNED.

The error committed by the lower court consists in its judgment sustaining the defendant's demurrer and dismissing plaintiffs' petition.

ARGUMENT.

I.

Since the demurrer was urged upon various grounds, some of which were recognized by the court as sound, and others considered insufficient, the clearer method of presenting the issues raised is perhaps by reviewing, in the first place, the points thought by the court to be well-taken, and, in the next, those not approving themselves to its acceptance, but still involved in the claim of counsel as pertinent and effective.

This mode of treatment will be pursued, and the opinion of the lower court considered as supplying the reasons conceived by it to authorize the judg-

ment now complained of. The arguments advanced in the opinion will be noticed in their order. (2 Woods, C. C. R., 272.)

First.

The first point taken by the court against the petition was, that it did not contain allegations sufficient to warrant recovery, inasmuch as it failed to aver the plaintiffs had procured the written consent of the owners of the abutting property to lay down the asphalt pavement. The learned judge's view was, that the contract to fill, curb, etc., and *pave*, was an entirety, not susceptible of division, and that the procurement of the consent referred to for the laying down of plaintiffs' *pavement* was a condition precedent to their exercise of any authority or claim of any right under the contract whatsoever.

The statement of the case already made, discloses that the last amended petition was not filed until the judgment and opinion of the court had been rendered, and that said amendment was made to meet and correct the court's erroneous construction of the proviso requiring the consent of owners of property to the laying down of the asphalt pavement.

The plaintiffs' claim for damages embraced no item for the breach of the contract to *pave*. The construction of their rights as presented in the plead-

ings was, that they had an *absolute* contract to do all the work named in the instrument executed between the city and themselves, except the *paving*, but that in respect to that their right rested upon a proviso, that they should obtain the written consent of the owners of the property abutting on said sidewalks to the laying down thereon of their particular pavement—asphalt—and the filing of said consent in the Mayor's office. Hence, as their work had not been permitted by defendant to advance to that degree of completion necessary to prepare the sidewalks for the reception of any pavement, and as they had not, from other causes, immaterial in their view to be named, procured such written consent for the fabrication of their pavement, they restricted their claim for damages to the city's breach of that part of the contract which they deemed unconditional, and as vesting them with fixed rights, independent altogether of the matter of paving. The ordinances, in pursuance of which it was claimed by the plaintiffs that the contract was made, provided that the named sidewalks should be paved with either one or more of five several enumerated kinds of pavement, asphalt being of the number. The committee, acting on the same theory of the powers conferred on them by the ordinance as that entertained by the plaintiffs, stipulated in their contract the price to be paid the plaintiffs for every cubic yard of filling

"done upon *any* and *all* of the said sidewalks preparatory to the laying of *any* pavement thereon;" and also the price to be paid for the wooden curbing "used in filling up and grading the said sidewalks preparatory to the putting down of the said pavement *or any other*."

The last amendment alleged the fact that there were as many different contracts executed by the city for *paving* as there were varieties of pavement named in the ordinance, covering each the same territory as plaintiffs', and each conditioned upon the assent of the property owners as plaintiffs, and that the whole work was provided for——that the reason of plaintiffs' suit being confined to other parts of the contract than the paving was that only those parts were *absolutely* subject to their performance, and that the city in all its relations to and acts concerning the work of sidewalk improvements recognized and adopted their interpretation of the contract.

It was expressly denied that the plaintiffs' failure to sue for damages resulting from the breach of that part of the contract which provided a price for the paving, was in consequence of the inferior profit on that work, and it was alleged to the contrary that the margin of profit on the paving was as wide as upon any other branch of the work; but because of the *conditional* nature of the paving obligation,

and the circumstance that others had as much right to claim privileges thereunder as plaintiffs, a prayer for relief on account of that part of the work was not presented.

It was thought that these specific allegations would relieve the mind of the court of any doubt of its misinterpretation of the proviso, but the amendment failed to alter its view that the proviso was a condition precedent whereof the performance should be alleged, not only as to the paving, but every item of the work, and the judgment on demurrer even as to that point, and after consideration of the amendment, suffered no disturbance.

It will be noticed that the *proviso*, so extended and magnified by the opinion, *does not purport*, in its terms, to be anything more than plaintiffs conceived it to be. Its place and order in the contract makes this apparent. It only appears in that instrument once, and then *not at its close*, as a condition qualifying the right of plaintiffs to do *all* the work but immediately following that part of the contract relating to the *particular* work of *paving*. To call it a condition precedent to the right of plaintiffs to perform any other work named in the contract than paving is to overlook the attendant circumstances in whose light the intention of the contracting parties must be discovered. +

The language of the contract itself is unambig-

+ Allen v. City of Janesville
85 Wis. 404-9.

power to create a debt and issue bonds to pay it; that if a municipal bond is invalid when given for stock in a railroad, the invalidity is due, not to the inability of the corporation to issue bonds, but to the foreign nature of the object of the subscription, it being in such case outside the purposes of the corporation, unless expressly authorized by the legislature.

"A municipal corporation may give its bonds for a legal and authorized debt, under its general corporate powers; the power to execute and issue bonds belongs to all corporations, and is inseparable from their existence." This opinion was delivered by Judge Strong, now associate justice of the United States Supreme Court, and the doctrine was affirmed by the latter tribunal in the case of Seybert v. Pittsburgh, 1 Wall, 272. It is said also by the Supreme Court of Connecticut (Bridgport v. Railroad Co., 15 Conn. 475, 501): "It has long been an established principle in the law of corporations, that they may exercise all the powers within the fair intent and

to the execution of its lawful corporate purposes. The same doctrine is asserted upon most satisfactory argument, both upon principle and authority, by the Court of Appeals of New York (Ketchem v. City, etc., 14 N. Y. 364), and also in a recent case in Nevada (5 Nev. 149), where the discussion is full, and authorities collected. To the same point and with the utmost emphasis, are the cases of The Bank v. Chillicothe, 7 Ohio, 354. Mills v. Gleason, 11 Wisconsin, 470

X The Ketchem case was a suit brought by taxpayers of the city of Buffalo to declare void a conveyance made to the city by one Austin, of city lots for market grounds, and to enjoin the levying of any tax or assessment in property in the city for the payment of the bonds issued by the city to purchase the lots.

The charter of the city conferred upon it the general power "to establish and regulate markets," but no express authority to purchase grounds therefor, or to issue bonds for the price of such grounds.

It was claimed by plaintiffs that the general power named did not authorize the purchase of the lots or the issuance of the bonds.

The court, however, affirming the judgment appealed from, held that the power to establish and regulate markets, not only embraced that of making the purchase, but also that of issuing bonds for

+ Approved Peterson V. Mayor 17 N. J. 452-3; Smith V. City of Newbern 16 Amer. R. (Jo N. C. 147) 766.

the price, and adjudged the bonds valid and binding upon the city. The court declares it to be "a sound rule, that when power is given to a corporation to do an act, it has a right to do whatever is necessary to accomplish the act." (P. 361.) And it adds, (p. 363):

> The power of corporations in general to make contracts and incur debt in the prosecution of their legitimate business and to give their promissory notes for such indebtedness, would seem to be firmly established, not only by universal practice, but by repeated judicial decision. (Mott vs. Hicks, 1 Cow., 513; Moss vs. Oakley, 2 Hill, 265; Keely vs. Mayor of Brooklyn, 4 Hill, 263; Moss vs. McCullough, 5 Hill, 151; Attorney General vs. Life and Fire Insurance Co., 9 Paige, 470; McCullough vs. Moss, 5 Davie, 567.)

Two separate opinions were written affirming the judgment in this case—the first (just quoted) by Selden J. and the second by Wright J.

In the latter (p. 375), the following language is employed:

> I think it must be conceded that the city had power to purchase ground for a public market. If so, there is nothing in the charter or general law of the State forbidding the purchase to be made on credit. It has never been doubted that a municipal corporation may become a debtor for property which it is authorized to acquire. Whether the credit belong or short is not a question of power, but of discretion on the part of the corporation; and the parties may contract on that subject as they may deem proper. A corporation authorized to do an act has, in respect to it, the power to make all contracts that natural persons could make. In Brady v. City of Brooklyn, (1 Barb., 584), it was held that

corporations have all the powers of ordinary persons, as respects their contracts, except where they are expressly, or by necessary implication, restricted. In Bears v. The Phœnix Glass Co. (14 Barb. 358), it was decided that the corporation possessed the incidental power to borrow money for the appropriate business of the corporation, and give its notes. So, also, it may exercise the incidental power of renewing notes taken in payment of debts. (New York Fire Insurance Co. v. Sturges, 2 Cow. 664). Though prohibited from engaging in banking operations, it may make a valid negotiable promissory note in payment of its debts, and it will be presumed valid until the contrary appears. (Baker v. Mechanics Fire Ins. Co., 3 Wend. 94). *Under its general powers, a municipal corporation may give a bond for muskets, and a suit on the bond will be sustained.* (State of New York v. City of Buffalo, 2 Hill, 434.) A corporation may issue negotiable paper in payment of a debt, and no provision in its charter or elsewhere, merely directing a certain form in affirmative words, should be construed as taking away this power. (Keeley vs. City of Brooklyn, 4 Hill, 263.) In Barry vs. the Merchants' Exchange Co., (1 Sandf., Ch. R., 280), the corporation had given its bonds, payable in ten years, to raise money to build with, it being authorized to buy land and erect buildings thereon for a public Exchange. It was held that the issuing of the bonds was within the power of the corporation, and their validity sustained. In short, as was said in Halstead vs. City of New York, (5 Barb., 218), "it has long been settled in this State that a corporation may, without any express power, give its note or bill of exchange, *when not prohibited by law*, for a debt contracted in its legitimate business."

Having the power to purchase the land for market grounds, in furtherance of the legal purpose the city of Buffalo could incur the debt in question, and make and deliver the evidence of its indebtedness.

The case of Bank of Chillicothe vs. Town of Chillicothe is of significant application. The suit was brought against the town upon the written promise of its Mayor to repay the plaintiff money borrowed of it. One of these obligations showed that the money for which it was given was used in improving a street of the town. A demurrer was interposed by defendant upon the ground that the town was without power, express or implied, to borrow money. The charter conferred upon the town the general powers usually granted to municipal corporations, including that of regulating and improving the streets. It did not grant the power to borrow money.

It was also insisted that, by an amendment to the charter, empowering the town to tax *without limitation*, any possible implication of the authority to borrow money was defeated, since there could be no necessity for its exercise, the power of taxation being adequate for all purposes of the corporation.

The court (p. 357, *et seq.*,) declares:

> It is certain that if the defense be legal, it is manifestly unjust, and such a defense as no court would sustain, unless impelled to it by some well settled and unbending principle of law. The corporation of Chillicothe have borrowed the money, for the recovery of which these suits are brought. * * * * This money has been used, as we are bound to believe, for the interest of the town; and now payment is resisted, upon the ground that this same corporation had not power to borrow the money; and that in doing

so they violated their charter. The language of defendants to the plaintiffs is in substance thus: When you loaned us this money you did it at our earnest solicitation, we have used it for our own benefit; but we have no power to borrow, we violated our charter in so doing, and we will take advantage of this our own wrongful act, to protect ourselves from the payment of that which is your honest due. No rule of decision which will lead to such manifest injustice ought to be adopted without careful examination and much deliberation. * * * * Although corporations have existed for centuries, still we have found no case in which inability to contract has been set up to avoid the payment of their debts * * Where certain powers are specifically granted, these carry with them such others incidental thereto as are necessary to carry those specified into effect. * * For the purpose of purchasing real estate, erecting and repairing public buildings, cleansing, raising, paving, draining, turn-piking and otherwise keeping streets in repair, contracts must necessarily be made. Ultimate payment, it is true, must be made from taxation. But until money could be thus raised, it seems to the court it might be provided otherwise, and, in no way better than by borrowing.

The Nevada case (Douglass v. Mayor, etc., of Virginia City, 5 Nev. 147) arose thus: The city took a lease of certain rooms for the use of its council, agreeing to pay a rental of $200 monthly, and in case payments were not made as they became due, to execute its negotiable promissory notes for the amount of said rental, bearing five per cent. interest per month. Notes having accordingly been executed, and not being paid at maturity, suit was brought by the holders thereof against the city to recover the amount.

It was not denied by the defendant that the city had the power to take a lease (as it is not denied in the case at bar that the city had the power to construct sidewalks), but it was claimed that it could not lawfully execute notes. The defense was presented by demurrer which the lower court overruled. The Supreme Court in affirming the judgment cites with approval the case of Ketchem v. City of Buffalo, *supra.*, and declares (p. 151) :

> That a municipal, like a trading corporation, may, unless in some way restricted by charter, enter into any contract necessary to enable it to carry out the powers conferred upon it—incur debts and execute and give promissory notes—in the discharge of its legitimate powers; or, in other words, that it has the right to adopt all the ordinary or usual means which may be necessary to the full execution or enjoyment of the power expressly given by its charter, is so firmly established by the authorities that at the present day it may be considered an elementary principle of the law of corporations.

The case from Wisconsin (Mills v. Gleason, *supra.*) discusses the question exhaustively.

The City of Madison had the power under its charter to purchase fire apparatus, cemetery grounds, to establish markets, and to do other things for which money would be a necessary means. It did not possess the power to borrow money or issue bonds, either expressly, or by any implication other than such as might in law arise from its investiture with the general powers mentioned.

Under these circumstances the city agreed to purchase of one Wright grounds for a cemetery and to issue to him its bonds in payment. It also issued bonds for the purpose of procuring money to erect city buildings, and for general city purposes. The peculiar fact about the bonds issued to Wright was, that although *contracted* to be issued before, they were *not executed until after* the passage of a law by the legislature expressly prohibiting the city from issuing, selling or disposing of any bonds except those specially authorized by the act, the cemetery bonds not being of this class. Taxes having been levied to pay the interest on these bonds, an action was instituted by Mills to restrain Gleason, the officer charged with the collection of taxes, from selling plaintiff's lands to realize said taxes.

The argument made by plaintiff was that the bonds were *ultra vires* and void, because not expressly authorized by the charter, and incompetent to be justified on the ground that their issuance was properly incidental to the execution of the city's general powers. It was especially claimed that the cemetery bonds were doubly invalid, because directly prohibited by law.

The injunction asked by the plaintiff was granted by the lower court and the reasons for its judgment

expressed in the most emphatic terms in the direction taken by plaintiff's argument.

Upon appeal the case was reversed by the Supreme Court, upon all the points made. After reciting the general powers conferred by the charter, the court proceeds (p. 491):

> It would seem, therefore, that in the absence of any restriction, the power to borrow money would pass as an incident to the execution of these general powers, *according to the well-settled rule that corporations may resort to the usual and convenient means of executing the powers granted;* for certainly no means is more usual for the execution of such objects, than that of borrowing money.

The validity of the cemetery bonds is affirmed, notwithstanding prohibitory legislation, on the ground that the contract of the city to pay in bonds was made before the law passed and the plaintiffs' right to its specific performance could not be impaired by the law, (p. 498).

In quite a recent case in Pennsylvania—City of Williamsport vs. Commonwealth, reported in 34 Leg. Int., 362—the doctrine of implied powers is asserted in the most distinct terms by the Supreme Court of that State, under facts which would seem to have required the utmost caution in applying it. It was provided by a private act of the Legislature, "that it shall and may be lawful for the city of Williamsport to borrow money from time to time for

city purposes, as may be required, not exceeding the sum of $200,000, *and issue bonds therefor.*"

The *charter* of the city conferred no express power to issue bonds or borrow money. This being the state of the law, the city issued bonds *in excess of* $200,000, for legitimate municipal purposes. It was held by the court:

1. That there being no restriction in the charter as to the amount of bonds the city might issue, and the over-issue being for proper corporate purposes the said over-issue was legal and binding on the city.

2. That where a municipal corporation has lawfully contracted a debt, it has the implied power *unless restricted by its charter, or prohibited by statute*, to evidence the same by a bill, bond, note or other instrument; the power to contract a debt carries with it, *by necessary implication*, the right to give an appropriate acknowledgment of such debt and to agree with the creditors as to the time and mode of payment; in the absence of any statutory provision, there is no rule of law limiting the extent of the credit.

It is even admitted by Judge Dillon, whose own opinion is the other way, that "the few express adjudications on the subject" favor the doctrine, that municipal corporations have the implied power to borrow money for their legitimate purposes, and

give the usual obligations for its re-payment, just as private corportions have. (1 Dillon on Corp., § 81.) But he claims there is a clear distinction between the power to borrow money and that to issue bonds. Practically, the distinction is not evident. So it was thought by this court, in Rogers v. Burlington, 3 Wall., 666, and, indeed, it does not appear from the opinion of Judge Woods, that such distinction constituted any element of his judgment in the case at bar.

It were useless and unprofitable to go further into the labor of a mere accumulation of authorities, to the point that municipal corporations, by virtue of their general powers, may issue bonds to achieve any proper end of their incorporation. The decided cases might be multiplied indefinitely.

The references selected by the eminent justice, as confirming his view, themselves abound with them. (1 Dillon on Corp., §§ 406, 407, and cases cited in notes thereto.) But the support deemed most substantial to the opposing theory, is claimed in his opinion to be afforded by two cases decided by this court—Police Jury v. Britton, 15 Wall., 566, and the Mayor v. Ray, 19 Id., 458. These cases demand notice. Neither would seem to admit of the application made of it.

The first was an action brought against the police jury of Tensas parish, Louisiana, to recover the amount

of coupons due for interest on bonds executed by the representative officers of the parish for the purpose of funding the debt of the parish, in accordance with an ordinance passed by the police jury. The defense was the invalidity of the bonds, of the ordinance under which they were issued, and of the drafts or orders for which they were substituted. A verdict was rendered for the plaintiffs, and judgments entered thereon. The Supreme Court reversed this judgment and held the bonds invalid, on the ground that their execution was wholly beyond the power of the police jury. The decision was evidently just, and in no sense conflicts with the theory insisted on by the plaintiffs in this case. It appears from the opinion that the powers of the police juries were limited by law to certain defined conditions not embracing in terms, or by implication, that of issuing bonds. Indeed they had no such scope of action or capability as that generally attendant on chartered *cities*, and the opinion indicates (p. 572), clearly the entertainment by the court of the distinction between the latter's breadth of power, and the former's, by the use of this language: "If it be once conceded that the trustees, or other local representatives of *townships, counties or parishes* have the implied power to issue coupon bonds, payable at a future day, which may be valid and binding obligations in the hands of innocent purchasers,

× See same distinction made by Mr. J. Dillon in Bojer v. Heiny Co. 26 Iowa 267–8. Also Beach v. Seeley 11 Kans. 28–31.

there will be no end to the frauds that will be perpetrated." The police juries were authorized by statute to levy and collect a certain tax which would constitute a special fund "for levee purposes only," out of this fund, *and from no other source*, the drafts for which the bonds sued on had been substituted, were payable. Thus an express mode, unmistakable and complete, was prescribed by the legislature, covering the whole subject-matter of which it treated, and the police jury disregarded the injunctions of its creator in two essential respects—first, in undertaking to "fund" this class of indebtedness, and second, in providing for its payment *with interest bearing bonds* not contemplated by law. In other words, the police jury was invested with authority to raise funds only by a definitive form of taxation. Did the charter of Galveston provide, that to meet the expenses of erecting sidewalks the City Council should levy a special tax which, when collected, should be a fund for that purpose only, there would be some analogy between the case cited and the one at bar. To measure the powers of a city, with its manifold wants and necessities, by those of a limited corporation, organized chiefly for police purposes and operating in rural districts, is to apply to the general subject an imperfect method of analysis incapable of yielding to the enquirer the true limitations of municipal jurisdiction.

Sterling V. Parish of West Feliciana
26 La. Ann. 60.

The second case seems even less satisfactory. The city of Nashville, possessing the ordinary municipal powers under its charter, but not thereby authorized to borrow money, issued its checks in form negotiable, drawn by its mayor and recorder on its treasurer. A number of these checks came into the hands of plaintiff and he brought suit thereon against the city. The defense was, that the issue of the checks was unlawful, and without authority of the city council. The issues of fact related to the circumstances of the execution of these checks. It was claimed by the defendant that they had been issued by particular members of committees and kept in circulation by the treasurer after coming to his hands, by a reissuance of them without the knowledge or consent of the city council, and in direct violation of its ordinances. And it was charged that one of the larger checks had been thus unlawfully issued in pursuance of a corrupt contract of the holder with a member of the city council. Proof to these allegations was tendered on the trial by the defendant, but rejected by the court, and the latter's charge to the jury was practically to instruct them that none of the irregularities complained of by the defendant affected the validity of the checks in the hands of the plaintiff—a purchaser thereof before maturity.

There was verdict and judgment for the plaintiff.

In the Supreme Court five judges out of eight then composing the court, concurred in the reversal of the judgment. Four of these placed the judgment on the grounds,

1st. That municipal corporations, without express, or clearly implied, authority can not borrow money, or issue negotiable paper free from equities in the hands of good-faith holders.

2d. That they can only carry on their functions (unless specially authorized) by the exercise of the taxing power.

3d. That their officers, unlike those of private corporations, can not create estoppels against them by illegal issues of pecuniary obligations.

4th. That the holder of such negotiable paper takes it subject to legal and equitable defences.

They admit that when the power to borrow money and issue bonds, etc., is possessed by a municipal corporation, such securities are controlled by the same rules as if issued by a private corporation.

The fifth concurring justice based his judgment on the error of the circuit courts in refusing to admit the defendant's offered evidence of want of authority and fraud; and in charging that the usage of the corporation to re-issue its securities after they had been paid, rendered such securities so

re issued valid. He (Mr. Justi
cally repudiated the doctrine o
a municipal corporation, befo
money, or issue its notes, must be thereto expressly, or by clear implication, authorized, and held, to the contrary, that such power existed, unless *expressly prohibited* by the charter (p. 483). He further held that such securities are subject to the rules of commercial law; and that in *no* event, the city having received the benefit of the transaction, could they be repudiated, whether merely irregular or *ultra vires.*

To the extent of his dissent from the doctrines advanced by the majority opinion Mr. Justice Hunt had the concurrence of the three remaining justices, Clifford, Swayne and Strong (p. 485). So that it is thus made manifest, that upon the proposition for which the majority opinion is cited by Mr. Justice Woods, there was in fact no decision at all, but an equally divided bench. That learned justice in his opinion conceding that the determination of the cause last named was by a divided court, yet affirms that "there is no dissent from the proposition in the case of Police Jury v. Britton." True, there is no dissent—there is, indeed, no mention of the latter case in any way. Had the Supreme Court been of opinion that the two cases ran in anything like parallel lines, it were next to impossible that

they could overlook their former judgment so recently delivered, especially when the scales of opinion in the then pending case must have been so readily determined by its citation. Nothing could be more conclusive, to the point that the two cases were not regarded as involving the same results, than the omission of all reference to the earlier one in the opinion delivered in the latter.

One may be wholly satisfied with the judgment in the Ray case, however, without yielding the proposition now sought to be maintained. The checks in the hands of Ray were issued to pay the debts and ordinary expenses of the city. For such purpose it may be, as suggested by Mr. Justice Bradley, that the ordinary power of taxation was adequate. The suit of Hitchcock & Co. is for labor done and damages incurred in the attempted performance of a contract for public improvements—beyond the resources of the ordinary taxing power. Such an action was doubtless in the thoughts of the eminent justice who delivered the majority opinion in the Ray case, when he said in the course of that opinion (pp. 477–8):

"There are cases, undoubtedly, in which it is proper and desirable that a limited power of this kind should be conferred, as where some extensive public work is to be performed, the expense of which is beyond the immediate resources of reasona-

ble taxation, and capable of being fairly and justly spread over an extended period of time."

It will be remarked that to the direct proposition advanced by Mr. Justice Bradley (not indeed necessary to, or involved in, the case before him), that the power to issue commercial paper to exist in a municipal corporation must be affirmatively conferred, he fails to cite a single authority, and, indeed, admits, that of late years the law has been otherwise in this country. It is equally noticeable that the dissenting justices sustain themselves by numerous decisions to the exact point at issue. X

By the light of the city charter also Judge Woods becomes satisfied that not only is the power to issue bonds for sidewalk improvements not conferred upon the city, but it is "clearly" excluded. Let us see.

The charter contains the following, among other, provisions, indicating the corporate powers:

TITLE I.

General Powers and Boundaries.

ARTICLE I.

CITY.

Section 1. Corporate powers and liabilities.

SECTION 1. *Be it enacted by the Legislature of the State of Texas*, That all the inhabitants of the city of Galveston shall continue to be a body politic and corporate, with perpetual succession, by the name and style of the "City of Galveston," and as such they and their successors by that name shall have, exercise and enjoy all the rights, immunities, powers, privileges and franchises, now possessed and enjoyed by said city, and herein granted and conferred, and shall be

X Curtis V. Leavitt 15 N. Y. 64-5-6-7.

Tracy V. Talmage 14 Id 162.

Oneida Bank V. Ontario Bank 21 Id 490.

subject to all the duties and obligations now pertaining to or incumbent on said city as a corporation, and may ordain and establish such acts, laws, regulations and ordinances, not inconsistent with the constitution and laws of this State, as shall be needful for the government, interest, welfare and good order of said body politic; and under the same name shall be known in law, and be capable of contracting and being contracted with, sueing and being sued, implead and being impleaded, answering and being answered unto in all courts and places, and in all matters whatever may take, hold and purchase, lease, grant and convey such real and personal or mixed property or estate, as the purposes of the corporation may require, within or without the limits thereof, and may make, have and use a corporate seal, and change and renew the same at pleasure.

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TITLE III.

Powers and Duties of Officers.

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ARTICLE X.

CITY CLERK.

SECTION 1. * * * * * *

The City Clerk shall be the general accountant of the corporation, and shall keep in books regular accounts of all receipts and disbursements for the city, and separately, under proper heads, each cause of receipt and disbursement, and also accounts with each person, including officers who have money transactions with the city, crediting amounts allowed by proper authority, and specifying the particular transaction to which such entries apply. He shall also keep a register of *bonds* and *bills issued by the city*, and all evidence of debt due and payable to it, noting the particulars thereof, and of all facts connected therewith, as they occur. He shall carefully keep all contracts made by the city, and he shall do and perform all such other duties as may be required of him by any law, ordinance, resolution or order of the City Council.

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TITLE IV.

Of the City Council—its General Powers and Duties.

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ART CLE III.

CITY COUNCIL.

* * * * * * * *

SEC. 2. That the City Council shall not borrow for general purposes, more than $50,000.

SEC. 3. To appropriate money, and to provide for the payment of debts and expenses of the city.

SEC. 4. To provide, by ordinance, special funds for special purposes, and to make the same disbursable only for the purpose for which the fund was created; and any officer of the city misappropriating said special funds shall be deemed guilty of a malfeasance in office, and shall, on complaint of any one interested in said fund so misappropriated, be removed from office, and be incapable thereafter to hold any office in said city; and shall, on conviction before any court of competent authority, be fined in a sum not exceeding five hundred dollars and be imprisoned not exceeding six months.

* * * * * * * *

SEC. 7. To have the exclusive control and power over the streets, alleys, and public grounds and highways of the city, and to abate and remove encroachments or obstructions thereon; to open, alter, widen, extend, establish, regulate, grade, clean, or otherwise improve the same; to put drains and sewers therein, and to prevent the encumbering thereof, in any manner, and to protect the same from any encroachment or injury, and to regulate and alter the grade of premises, and to require the filling up and raising of the same.

SEC. 8. To establish, erect, construct, regulate and keep in repair bridges, culverts and sewers, *sidewalks* and crossways, and to regulate the construction and use of the same, and to abate and punish any obstructions or encroachments thereon; and the cost of the construction of sidewalks shall be defrayed by the owners of the lot, or part of lot or block, fronting on the sidewalk; and the cost of any sidewalk constructed by the city, shall be collected, if necessary, by the sale of the lot, or part of lot or block on which it fronts, together with the cost of collection, in such a manner as the City Council may, by ordinance, provide; and a sale of any lot, or part of lot or block, to enforce collection of cost of sidewalks, shall convey a good title to the purchaser, and the balance of the proceeds of sale, after paying the amount due the city, and cost of sale, shall be paid by the city to the owner.

* * * * * * * *

SEC. 53. The City Council shall have power to pass, publish, amend or repeal all ordinances, rules and police regulations, not contrary to the Constitution of this State, for the good government, peace and order of the city and the trade and commerce thereof, *that may be necessary or proper to carry into effect the powers vested by this act in the corporation, the city government, or any department or officer thereof.*

* * * * * * * *

TITLE V.

On Taxation.

ARTICLE I.

SEC. 1. The City Council shall have power within the city, by ordinance, to annually levy and collect taxes, not exceeding one per cent. on the assessed value of all real and personal estate and property in the city, not exempt from taxation by the Constitution of the State.

ARTICLE II.

SEC. 1. To annually levy and collect a poll tax, not to exceed one dollar, of every male inhabitant of said city over the age of twenty-one years, who has resided therein twelve months previous to the assessment of said tax.

ARTICLE III.

SEC. 1. That the City Council shall have power to levy and collect taxes, commonly known as licenses, upon trades, professions, callings and other business carried on, and upon carriages, hacks, coaches, buggies, drays, carts, wagons, and other vehicles used in said city, whether the same are for public or private use. * * *

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TITLE IX.

Streets and Alleys.

ARTICLE I.

CITY COUNCIL.

SECTION 1. The City Council shall be invested with full power and authority to grade, shell, repair, pave, or otherwise improve, any avenue, street or alley, or any portion thereof within the limits of said city, whenever, by a vote of two-thirds of the aldermen present, they may deem such improvement for the public interest; *provided*, the City Council pay one-third and the owners of the property two-thirds thereof, except the intersections of the streets, from lot to lot, across the streets either way, shall be paid for by the city alone; *provided*, that not more than two thoroughfares extending from Fifteenth to Thirty-fifth streets, and north to the south line of Avenue D, otherwise known as Market street; and none other shall be paved otherwise than with shells, within any period of five years, and that the cost of two-thirds of such pavement of said two thoroughfares shall be paid through the issue of bonds of the city, bearing interest, as in this charter provided for other bonds, and having five years or more to run; and said cost shall be assessed on the property fronting on said thoroughfares, to be collected in equal annual payments, not less than five in number, and all moneys collected from these assessments shall be appropriated exclusively to the payment of the bonds issued for the payment of the cost of said pavement.

ARTICLE II.

SECTION 1. That whenever the City Council shall determine to make any such improvement, they shall cause an estimate to be made of the probable cost thereof by the Street Commissioner, or by some other officer of the City, or by a Committee of Aldermen; and such officer or committee shall also report a full list of all lots, or fractional lots, giving number and size of the same, and the number of the block in which situated and the names of the owners thereof, if known, and such other information as may be required by the City Council, and if there be any lot, or fractional lot, the owner of which is not known, the same shall be entered on said list as unknown; it shall be the duty of the officer, or committee aforesaid, to enter on said list, opposite each lot, or fractional lot, lying and being on each side of the street, avenue or alley, so to be improved as aforesaid, one-third of the estimated expense for such work or improvement on such avenue, street or alley, fronting, adjoining, or opposite such lot or fractional lot, and on the acceptance and approval of said report and list by the City Council, said amounts shall be imposed, levied and assessed as taxes, and shall be a lien upon the property until the payment of the same.

ARTICLE III.

SECTION 1. That after such action, on the part of the City Council, as above provided for, such officer or committee shall give notice, as may be required by ordinance, of said tax being due, and within what time payable, and shall commence forthwith to collect the same. That after the expiration of the period for payment of said tax, said officer or committee shall levy on so much of any property on said list, on which said tax has not been paid, as will be sufficient to pay the same; and the same notice of sale as is required in sales for other taxes shall be given; and if said tax is not paid before the day of sale, said officer or committee shall sell said property in the manner, and under the circumstances, and to the extent, and subject to the same conditions, which are, or may be provided by ordinance for the sale of real estate in the City of Galveston, charged with the payment of taxes imposed by said corporation; and said officer or committee shall execute a deed to the purchaser, at any such sale, and all the provisions of this act, in reference to a deed drawn by the collector for taxes, shall apply to to the deed provided for in this section.

TITLE IV.

SECTION 1. That in addition to the power and authority granted to the City Council to collect said assessments of taxes, as aforesaid, they shall have the further and additional remedy of instituting suit, in the corporate name, in any court having jurisdiction, for the recovery, against any owner of said property, for the amount due for

any such work, so made as aforesaid; and the City Council shall provide, by resolution or ordinance, under the provisions of this act, for carrying out, and executing the powers in this title conferred, and may adopt such resolutions, and enact such ordinances, and make such rules and regulations as they may deem necessary.

In commenting on some of these provisions the learned judge concludes:

1st. That the express limitation of the borrowing power of the city to $50,000 for *general* purposes, is neither an expression nor implication of a power to borrow for *special* purposes.

2d. That the sections authorizing the appropriation of money, and the providing for the debts and expenses of the city, and those authorizing special funds for special purposes, and the assessment of the cost of construction of sidewalks upon the owners of abutting lots, mean only, that the money to pay debts and expenses and the special funds, are to be raised by the means expressly given in the charter—taxation or special assessment—and not by the issue of bonds.

3d. That since by Sec. 1, Art. 1, of Title IX, express power is given to the city to issue bonds for the improvement of streets and no like power is elsewhere conferred in the terms of the charter, therefore such power was intended by the legislature to be *limited* to that purpose.

4th. That Sec. 8, Art. 3, of Title IV, in providing that the cost of the construction of sidewalks should be defrayed by the owners of abutting lots,

by sale thereof if necessary, excludes the idea that the city may pay for such improvements by the issuance of bonds. It does not seem to have occurred to the court, that the express recognition of the city's power to issue *bonds* and *bills*, contained in Sec. 1, of Art. X, Title III, (*supra.*) was a circumstance of any significance in resolving the question of its power to issue *these* bonds; or, that Sec. 53, of Art. III, Title IV, authorizes the Council to do anything, or everything, necessary *or proper* to carry into effect the powers vested in the corporation by the charter.

To his conclusions, as stated, the objections are obvious. The first may be passed with the observation, that in the very nature and necessity of language, as interpreted by the ordinary rules of construction, the limitation of the borrowing power to a *certain* sum for *general* purposes, implies the absence of limitation where the power is exercised for *special* purposes, as well as the *existence* of the power itself for such purposes.

If argument were needed to sustain this necessary construction it is supplied by section 28 of the charter of the city, passed 2d of August, 1876, repealing the charter in force at the time this contract was made, and the proceedings affecting this controversy were had. That section appears in the corresponding title of the new charter, wherein the

duties and powers of the City Council are defined. It is evidently designed to replace Sec. 8, Art. 3, of Title IV of the old charter. It is in this language:

SECTION 28. That the City Council shall not borrow for general *or special* purposes more than fifty thousand dollars in any one year.

The Legislature certainly understood that the declaration in the charter it was seeking to repeal:

"That the City Council shall not borrow for *general* purposes more than $50,000,"

implied clearly that the power of that body to borrow money for *special* purposes not only existed, but was not restricted to $50,000, or any other arbitrary sum. Hence, to remove this manifest implication the restriction was made to embrace special as well as general purposes, and the period (one year) within which that power could be but once exercised was carefully fixed. (United States vs. Freeman, 3 How., 556.)

It may be observed also, that if Sec. 4, Art. 3, Title IV, empowering the City Council to provide special funds for special purposes, means only that such funds may be raised by taxation or assessment, and not otherwise, it is difficult to perceive the utility of such a provision, since the power to tax is expressly conferred by other sections of the charter. (Title V, *Sup.*) and the power to make special assessments (for local improvements) is elsewhere

recognized in explicit terms by that instrument. (Sec. 8, Art. 3, Title IV; Title IX *Supra.*)

And again, legislative interpretation may be resorted to to show that the power conferred upon the Council by this section was distinct from, and additional to the powers of taxation and assessment, and that the section is not a mere combination of unmeaning words. For in the present charter (Sec. 31) this section of the former charter is re-enacted, with the single unimportant substitution of the words "misapply" and "misapplied," for "misappropriate" and "misappropriated," and a change of the prescribed penalty of $500 for its violation to $5000.

So far as the general power of taxation may supply an element of consideration in construing the terms of the Council's authority, it may be remarked that *that* power is limited by the charter to one per cent., and can be exercised but once in and for each year. The result of its exercise would prove wholly inadequate to the many and legitimate corporate ends to be achieved, and it could not have been intended by the Legislature that every need of the city should be supplied in this way.

The remaining points may be more readily disposed of, by showing affirmatively their unreasonableness and inconsistency, considered together.

Secs. 7 and 8, of Art. 3 of Title IV, of the charter, confer upon the City Council exclusive power and control over *streets* and *sidewalks*, respectively. This power, without specifications in the charter of its manner of exercise, would place in the hands of the Council the discretion to choose *any of the many* suitable and proper means by which it could be put into operation—upon the general theory of municipal action and administration already discussed. In a subsequent section (Sec. 1, Art. 1, Title IX), express power is given the city to issue bonds for the improvement of *streets*, and this is construed by the learned judge to be a denial of that power for any other purpose. I place a wholly different interpretation upon that section.

It was a limitation applied by the Legislature to the general power conferred by Sec. 7, Art. 3, Title IV, on the *single* subject of *street* improvement (that article having embraced other descriptions of improvement), providing that not more than *two thoroughfares*, between indicated boundaries, should be paved, otherwise than with shells, within any period of five years, and that the cost of paving *such* "*thoroughfares*" should be paid by the issuance of the city's bonds. It indicates no restriction of power to "grade, shell, repair, pave, or *otherwise improve*" (not merely to *pave*, as in the case of the two thoroughfares) "*any* avenue, street or alley, or

any portion thereof within the limits of said city" other than the two thoroughfares named, at the pleasure of the Council; provided, if such improvement is made by *paving*, the material used must be *shells;* nor does its language imply that the cost of improving (whether by paving *or otherwise*,) such other "avenue, street or alley," can not be properly defrayed by the issuance of bonds. Much less can it be inferred that such bonds may not be lawfully issued for any other corporate improvement.

It is respectfully suggested, that so far from proving the incapacity of the city to issue bonds for any purpose than that of paving two thoroughfares therein named, the first section of the first article of Title IX, merely *confines* the city to that mode of paying for such *paving*, leaving its *general* power of contracting and providing for other classes of improvements unaffected. This seems too clear for doubt. It will be observed that every word of the section after the last *proviso* applies *alone* to the *paving of the two thoroughfares*, and the mode of defraying the cost thereof. The preceding part of the section confers the general power to grade, shell, etc., the avenue, streets, and alleys of the city, and fixes the proportion of the cost of such improvement between the city and property owners. It does not even indicate the *mode* of assessing, collecting, or paying these proportionate shares of the

cost, but leaves that to be regulated by the following articles of the same title (*supra*). For any other legitimate improvement the city may pay cash, execute its promissory notes, issue its bonds, or contract as it deems best; only for the paving of these two thoroughfares is it restricted to make payment in *bonds*.

It is supposed that in adopting this construction of the *proviso* of Sec. 1, Art. 1 of Title IX, the lower court considered itself encouraged by the maxim *expressio unius est exclusio alterius*. That maxim like others, should be cautiously applied as an aid to construction, even where it is conceded to be clearly pertinent.

A well-known law writer (Ram on Legal Judgment, p. 45) declares, that—

> *Maxims*, or legal maxims, are not to be received as *axioms*. We believe that not a single law maxim can be pointed out which is not obnoxious to objection. The old law maxims must be put aside or forgotten, or remembered only as things of the past and dead, even as we have put aside and forgotten maxims in science, supplying their places with maxims drawn from a larger experience and more philosophical analysis.

This maxim is not of universal application, but depends upon the *intention*, as discoverable upon the face of the instrument to be construed, or the transaction to be interpreted. (Saunders v. Evans, 8 H. L. Cases, 729; Potter's Dwarris on Statutes,

676). In the English case cited it was attempted to be applied to a case where by a marriage settlement lands were settled to the use of the wife for life, remainder to such person as she should appoint by deed or will. She executed the power by deed with reservation of power to revoke and appoint anew *by deed*, and then revoked the deed. It was held that a subsequent appointment by *will* was valid. The Lord Chancellor (Campbell), observes:

> Then great reliance is placed upon there being an expression of a reservation of power to appoint by deed, and upon nothing being said about the power to appoint by will. There is certainly an axiom of law, *expressio unius est exclusio alterius.* But that is not of universal application. It depends upon the intention of the parties as it can be discovered upon the face of the instrument or upon the transaction. * * * * * *
>
> Then Mr. Greene in his argument, wished very much to insert the word "only;" and he asked how it would have been if the words "only by deed" had been introduced. The short answer to that is, that in that case it would have been *a totally different instrument*, and would have been subject to a totally different construction. But if it was the intention of the testatrix that it should be *only* by deed, *why was not that word introduced?*

The case of the People v. Supervisors of Ingham county, (20 Mich., 100–1), furnishes a fair parallel, as I conceive, to the one at bar, in so far as the rule of interpretation upon the point now being considered is involved. By an act of the Legislature of Michigan it was declared:

SECTION 1. That the Board of Supervisors of the several counties within this State are hereby authorized and empowered to cause to be laid out, established, altered, discontinued or opened all State and territorial roads, heretofore or now laid out, or hereafter to be laid through or within their respective counties, whenever they may deem it for the interest of the public.

SEC. 2. Whenever the Board of Supervisors of any county are petitioned to by at least twelve freeholders of each of the townships, through which any such road or roads may pass, they *shall upon such petition* authorize the Commissioners of Highways of such townships, to cause the line of said road or roads within their respective townships to be surveyed and located therein, and such commissioners shall report such survey and location to the Board of Supervisors of their county, and *upon examination of such survey and report*, said board may declare such road or roads duly laid out, established, discontinued, opened, or altered, as the case may be; provided that such board shall deem the laying out, establishing, altering, discontinuing or opening said road or roads for the interest of the public.

This being the state of the law, the Board of Supervisors of Ingham county, by resolution, discontinued a road which had been a public highway for fifteen years, *without* a petition of twelve freeholders of the townships of the county through which the road ran. Property owners along the line of the discontinued road complained of this action and litigation ensued about it. It was claimed by the complaining parties that the board could acquire no jurisdiction of the question of discontinuance of the road until a petition for its action should be made by twelve freeholders of the townships, respective-

ly. Thus, the court was required directly to construe the two sections of the law. After conceding that the objection to the action of the board was well taken—"if the board derive all their authority to act from the second section," the court proceeds:

> But after a careful examination of the act, I am inclined to think that *plenary jurisdiction of the question was conferred upon the board by the first section of the act:* and that under this section they have full power to act, without any petition, upon their own motion, and without any restrictions from the provisions of the second section; that the second section was intended *not to confer a power*, but to *impose the duty* of acting when the petition there mentioned should be presented; in other words, that the first section confers the power *without any restriction not mentioned in it*, while the second imposes a duty *under certain circumstances*, and provides *how that duty is to be performed.*

In a Maryland case (Stockett v. Bird, 18 Md. 484) the court was called upon to adjudicate a question of title between the administrator of the estate of a wife and the administrator of the estate of her husband to certain *choses in action* given to the wife, during coventure and not reduced to possession by the husband during *his* life time.

The statute on the subject contained two separate sections whose construction was involved in the litigation. One of these sections declared, in effect, that when a married woman should die intestate "*her personal property*" should vest absolutely in her husband; the other provided that the "*choses*

in action" of a married woman dying intestate should devolve upon her administrator, unless in the lifetime of the husband reduced by him to possession.

It was contended by the husband's representative that *choses in action being personal property* passed to the husband upon the death of the wife, and that since the first section contained the general rule of descent of such property the last section was repugnant thereto and inoperative. The court, however, said:

> It is the duty of the court to construe these apparently repugnant provisions so as to give them effect, and by applying a familiar rule of construction in such cases, we think there can be no difficulty in reaching the result. The provision contained in the 2d section of Art. 45, is general in its terms, and by it the personal property of the wife dying intestate is made to vest in the husband absolutely, yet as the Legislature did, by the 32d section of Art. 93, provide for a case of a husband surviving his wife, she leaving *choses in action*, and these not reduced into possession, or judgments obtained on them by the husband, such legislative act *creates an exception*, and *the two provisions should be read together and construed in that relation*. So considered, they must be construed upon the rule, "that when a general intention is expressed in a statute, and the act also expresses a particular intention, incompatible with the general intention, the particular intention is to be considered in the nature of an exception." Dwarris on Statutes.

So, it would seem, where by a general provision of the charter of Galveston power is conferred upon the city to open, alter, widen, extend, establish, reg-

ulate, grade, clean, or otherwise improve its streets, (implying the power to effect these purposes by any means best adapted to the end in view) a subsequent special provision that a small portion of the work thus authorized to be done should be paid for in an indicated manner should be regarded as an exception to, or limitation of, the general power as *applied to that particular work*, and not as repugnant to, or otherwise restrictive of, said general power when exercised in the accomplishment of *other* work not embraced in the exception. *A fortiori* where a like general power is conferred by a distinct section, and is exercised in the aid of other than street improvements, and supported by other numerous provisions of the charter.

An instructive case on this subject is that of The Uncas National Bank of Norwich v. Rith, decided in 1868 by the Supreme Court of Wisconsin, (23 Wis., 329). The Milwaukie & Superior Railroad Co. was incorporated with power and authority to locate, construct and maintain a railroad within certain limits. By the fourteenth section of the charter the directors were authorized "to make such covenants, contracts and agreements with any person or persons, co-partnership or corporation whatever, as the execution and management of the work and business, and the convenience and interest of the said company may require." By the twenty-third section

of the same instrument, the directors were authorized to execute a mortgage or deed of trust upon the property, corporate rights and franchises of the company, to secure the payment of its bonds.

The company having acquired ownership of a note and mortgage in the course of its business, subsequently transferred and delivered these to a holder of one of its bonds to secure the payment of said bond. Litigation arising from this transaction, the point was taken that the railroad company had no power under its charter to transfer the note and mortgage for the purpose of securing its bond, since the twenty-third section by expressly indicating that the payment of said bonds should be secured by mortgage or deed of trust upon the property, corporate rights and franchises of the company, excluded any other mode of making such security.

It was held by the court that the power conferred upon the directors by the fourteenth section was not abridged or limited by the twenty-third section, but that under the former section it was altogether competent for the act complained of to be performed. The latter section was construed by the court not to be a limitation upon the powers invested in the directors by the former, but to convey in unambiguous terms a special power, which if exercised under the general grant of the fourteenth section might occasion controversy and dispute. It will be ob-

served that the court (p. 342), declines to affirm, that even in the absence of the twenty-third section the power conferred by that section could not be properly exercised under the general grant of the fourteenth section; but considers, that for the purpose of enabling the directors to exercise so supreme an authority as that of *mortgaging and alienating the property and franchises of the corporation*, it was thought proper by the legislature so to express its will in plain words.

Upon the assumption, therefore, that the issuance of bonds, or the borrowing of money, are means by which a corporation under its general powers may achieve the objects of its institution, the case is apt authority to the point, that the City of Galveston, under its general powers, could issue bonds or borrow money to achieve the purposes of its incorporation—as it is, unquestionably, authority for the proposition to which it is here cited, viz: that the doctrine of *expressio unius est exclusio alterius* can not be applied to the construction of the charter of Galveston so as to make a *proviso* of a section (1 of Art. 1, Title IX, *Supra.*), which itself relates to but *one* of the *many* subjects of municipal jurisdiction enumerated in the charter, the controlling rule of that entire instrument. The learned judge was afforded an opportunity at an early stage of his argument to have given the maxim an obviously just

and pertinent application when he was considering the language of Sec. 2, Art. III, Title IV, limiting the City Council's power to borrow money for *general* purposes to $50,000—or of Sec. 4 of the same Article, enabling that body to provide, by ordinance, *special* funds for *special* purposes.

A very satisfactory exposition of the rule proper to be pursued in construing a statute embracing general and special provisions on the same subject is given by the Supreme Court of Wisconsin in the case of the State ex. rel. Lutfring v. Goetze (22 Wisc., 363.) It was an action to try the title to the office of County Judge. The question arose upon the construction of Secs. 29 and 157, of chapter 13 of the Revised Statutes of the State. The former section prescribed the mode in which the County *Judge* should qualify for office; the latter the mode in which county *officers* (generally) should qualify. The requirements of the two sections were different. The defendant had qualified under the general provision. The court (citing the same passage from Dwarris quoted in the Maryland case, *supra.*), held, that although Sec. 157, regulating the subject of qualification by county officers, would have authorized the defendant to qualify under its provisions, *as any other county officer*, in the absence of Sec. 92: yet, since that section indicated a particular rule to govern the matter of qualifica-

tion of the County *Judge*, that rule should have been observed by the defendant, and not having followed it he did not become a lawful officer.

If it be true (and I assume it to be true in this division of the argument) that, in the absence of the second proviso of Sec. 1, Art. 1, Title IX of its charter, the city of Galveston could lawfully issue bonds, notes, make other forms of contract, or borrow money, for the purpose of improving sidewalks or streets—under its general powers, express or implied—the reasoning of the case cited warrants the conclusion that the introduction of that proviso could not have the effect to take away such general powers, but only to limit them in the matter of paving *the two thoroughfares* therein mentioned to the *one* mode of effecting that improvement, viz., the issuance of bonds.

The construction of Sec. 8, Art. 3, Title IV, to mean that no bonds can be issued for the improvement of sidewalks, because the cost of constuction is fixed upon the owners of the abutting property, appears to be erroneous by the very terms of the section itself. It reads:

"And the cost of any sidewalk *constructed* by the city shall be collected, if necessary, by the sale of the lot, or part of lot or block on which *it* fronts," etc.

What costs are being provided for? Indubitably,

the costs of a *finished, constructed sidewalk;* not of one to be *hereafter* constructed. What lots are to be sold, if necessary? Those on which *it—the completed sidewalk,* not the unfilled and ungraded ground—fronts. Can anything be clearer? The theory of the court involves the self-condemned assumption, that before the city can undertake the improvement of the property of its citizens, it must first levy a tax for the prospective costs thereof on the property, and in the event of the non-payment (from any cause) of such tax, the thing to be improved is to be divested by sale from its owner and the beneficiary of its improvement!

It may be supposed that the legislature might impose upon a citizen the possible forfeiture of his property to make good the costs expended in its improvement, but it is scarcely to be believed that such a body would authorize its sale for the purpose of its improvement. That were conformity indeed to the maxims of "paternal government!"

The difficulty lies simply in the failure of the eminent justice to distinguish between the power of the city to make a contract with Hitchcock & Co., for the construction of sidewalks by the execution to them of its corporate obligations, and its right to provide *as between itself and its citizens,* for the payment, or protection, of those obligations. This distinction is clearly indicated in the opinion of this

court in the case of Town of Queensbury v. Culver (19 Wallace, 93). There a suit was brought by Culver, a bondholder, against the town. It was claimed in defense thereof, that since the law provided specially the *mode* of collection of the fund necessary to pay the bonds, and indicated the *persons* who were to pay them, and the *manner* of payment, the creditor was restricted to that plan, and could not sue the town directly. The court held the plea bad, and announced that the special regulations referred to therein could only be construed as directory by the corporation to its own officers and agents and not to the holders of the bonds. So in the leading case of Cumming v. Brooklyn (11 Paige 596). + Although the contract of the complainants with the city was to grade and regulate one of the avenues of the city at a price to be paid out of the property to be benefited by the improvement, yet upon completion of the work an action against the city for the contract price (the assessments not having been collected), to be paid out of its *general* funds, was sustained. The doctrine of the opinion is, that the regulations of the city as to paying for improvements by a fund to be raised by special assessments, are mere conventions between the corporation and its citizens, and do not measure the *complainants'* rights under their contract with the corporation.

The court declares, that the corporations' *general*

+ Allen v. City of Jeffersonville 35 Indiana. 404-9.
See also, City of Louisville v. Hyatt, 5 B. Mon. 201-3.

powers enabled it to make the contrrct, and the charter contained nothing *prohibiting* it. Then occurs the following:

"It is true the same section of the charter which authorized these improvements to be made directs the expense thereof to be assessed upon the owners and occupants of the lands and premises benefitted thereby, in proportion to the amount of such benefit. * * * The assessment of the expense, as a local tax, is not, however, a restriction upon the power of the corporation so as to require it to contract only for payments out of that particular fund. *But this local tax is a fund which has been provided by the legislature to reimburse the corporation for the expenses of an improvement which it has either paid, or becomes liable to pay.*"

This case is expressly approved by the New York Court of Appeals in Baldwin v. Oswego (1 Abbott's Dec., 63), by each of the judges in separate opinions (pp. 68, 74). That case, strangely enough, was conceived in the Circuit Court to affirm the doctrine that the city charter, by providing (Sec. 8, Art. 3, Title IV) that the cost of constructing sidewalks should be imposed on the owners of abutting property, had inhibited any other provision for its payment, as between the city and Hitchock & Co., and any other form of contract therefor, except such as should depend for its performance by the city upon that mode of collection.

It is believed that an examination of the case, and of the many authorities discussed by the judges in reaching its determination, can not fail to re-

move any such conception of its significance and doctrine.

The opinion in the case at bar suggests as a reason for restricting the city to the mode of assessment against property owners in providing for the payment for erecting sidewalks, that by the issuance of bonds the city becomes liable for any excess of cost of improvement over the value of the property subject to assessment.

Is not this a two-edged sword? Would the property-owner, in any event, under the system of assessment, be responsible for a cost exceeding the value of his property subject to assessment? It has been well decided not. (Taylor v. Palmer, 31 Cal., 254–5.) Suppose, then, the city should make a contract, undertaking to pay a contractor from the proceeds of assessments made on the property to be improved, by inch and foot and depth and breadth, and the work, when finished, should be of greater value than the property assessed. Would not the city be responsible to the contractor out of its *general* funds for such excess? It surely seems so. If so, would the liability of the city have been in any degree increased by the issuance of bonds in payment of the work instead of the use of the other form of obligation? Certainly not.

It has been recently held by this court (City of Memphis v. Brown, 20 Wall., 310) that power given

to a city to assess the expense of paving upon adjoining owners, does not impair the power of the city itself to do the work.

But whatever merit may be claimed for the reasoning by which the lower court sought to sustain its judgment, what warrant can be found for a ruling which denies to the plaintiffs the right to recover—if nothing more—the value of the work done and material furnished for the city at its own instance and in pursuance of a solemn contract, entered into, to say the least, in good faith, and continued towards performance on their side until inhibited by the arbitrary act of the city?

Even the claim of counsel is exceeded by the court's judgment; for in the amended answer filed 17th February, 1875, (Transcript, pp. 41, 42 and 43), and replete with every character of demurrer, general and special, this particular prayer for relief is not considered as subject to demurrer. It is, on the contrary, twice expressly conceded that exception is not taken to so much of the petition and the amendments thereto "*as sues for the value of work and labor actually done and materials furnished to the city of Galveston.*"

The effect of the judgment is to declare, that the plaintiffs, expending in work and materials, received and appropriated by the city, the sum of $18,193 63$\frac{1}{100}$ in good faith, at the city's instance,

under a contract *supposed*, at least, to be valid, are utterly without right to claim, or remedy to recover, one dollar of that sum, although the city by its pleadings expressly disavows the immunity from responsibility thus accorded to it.

It is not easy to associate with such a rule the idea of justice. Assume, if you please, that the ordinances, the contract, and all proceedings had in pursuance thereof, were *ultra vires* and void, the fact remains, nevertheless, that the plaintiffs have, without fraud and with clean hands, supplied to the city at its instance, and the city has received from them, their labor and property of the value of $18,193 63$\frac{1}{100}$, and refuses to allow them compensation therefor. Under such circumstances, is it conceivable that *the law* affords to the sufferers no remedy? (The Mayor v. Ray, *per* Hunt, J., 19 Wall 483-4-5, and cases cited). X

≠ This is not a suit upon *bonds*, but one to recover, in part, the actual value of work and materials, furnished by one party to another at the instance of that other; and, in part, to secure indemnity for damage alleged to have accrued to the complaining party by the wrongful act of the other.

It is no answer to the prayer for relief to say, that the *evidence* of the obligation agreed to be executed by the defendant to the plaintiffs is in an

≠ Hallis V. Chapman 36 Texas 2.

X Mayor V. Ray 19 U. S. 477-483-4-5. McGovern V. Albany 14 N. Y. Sup. Ct. R. (57 Hun) 423-4.

unlawful form. The *obligation itself*—to do justice —to act honestly—not to take, keep, and enjoy something for nothing—survives. (Alleghany City v. McClurkan & Co., 14 Penn., St. 83.)

The principal reason advanced in support of their view by those who deny the power of municipal corporations to issue bonds in the absence of express authority therefor, is the great public injury that is liable to follow the exercise of an authority whereby *negotiable paper*, binding the corporation and *free from equities in the hands of third parties* can be put in circulation. Once conceding that such corporations may contract *at all* for local improvements (*e. g.* the paving of sidewalks), I do not understand them to deny that an obligation *not* negotiable in form, and at all times open to any defences competent to be made by the obligor, can be lawfully executed by such bodies. In other words, they admit the lawfulness of a contract against which the corporation sought to be bound thereby is *always* entitled to make its defences, irrespective of any change of beneficial interest therein.

How then can the question of power be an important one in this case, since the defendant is in position to defeat the action if it be one not proper to prevail? If the power to contract be not *wholly* denied, could not the defendant make itself responsible, say by the execution of a non-negotiable obli-

gation? If so, would not, to say the least, a liability of equal dignity follow its breach of a contract to execute negotiable paper for a consideration already partly performed? And in a suit between the original parties could it be considered an answer to the allegation of damage that the defendant only promised to deliver *negotiable* paper? Paper negotiable in form may be no *better* than paper not negotiable; but I do not apprehend how it becomes valueless *because* negotiable.

II.

Besides the points taken by the demurrer and sustained by the court, others were urged by counsel below, and will be perhaps renewed on argument here. To these, therefore, it is proper to advert. They will be considered in the following order:

First.

It is denied that the Mayor and Chairman of the Committee on Streets and Alleys possessed the power to execute a contract binding on the city, because however much the City Council may have designed to confer such power, and however apt the terms evidencing such design, that body was powerless to do so.

The argument assumes to be based on a familiar maxim of the law, that legislative power vested by

sovereign authority in a political subdivision of the Government (as a municipal corporation) can not be delegated by the agency thus entrusted with it, to a sub-agent, but must, to be valid, be exercised by the corporation itself in its organic form.

The maxim as stated is disputed by no lawyer; but the *application* sought to be made of it here is warranted, in my judgment, by neither reason or authority; and the reduction of the theory it involves to its ultimate analysis is the only process needed to disclose its vicious perversion of the principle claimed to underlie it.

If there be any feature about corporations—using the term in its general sense—more characteristic than any other, it is that they habitually, and of necessity, act by and through *agents*. They have no visible body, nor sentient existence. They grow out of the artificial forms and needs of civilized life, calling for organized agencies to assist in the administration of governmental and business affairs. What they do is done by instrumentalities acting in the particular directions prescribed by law for the exercise of their allotted powers.

Their subdivision into what are known as private and public corporations has no effect to take away their inherent incapacity to act otherwise than by delegation, or proxy.

Both are bound by the acts of their agents just as

private persons are. In Burrill v. City of Boston, (2 Clifford, C. C. R. 592) the point was made by the city, that the contract sued on having been executed by the Mayor did not bind the corporation. The court said:

> We are not able to concur in that view of the law. On the contrary, we hold that the action is well brought if the Mayor in executing the instrument acted as the agent of the City Council, and the defendant under their (its) charter, or the laws of the State, had power to enter into the contract. Ford v. Williams, 21, Howard 287.

This case cited by the court was one involving a question of agency between private parties. The reference indicates that the fact of a principal being a corporation operated no change in the law of agency. So in San Antonio v. Lewis, (9 Tex. 70), the court, in discussing the power of municipal corporations to make contracts through agents, cites several cases, (Bank v. Patterson, 7 Cranch, 299; Dunn v. Rector of St. Andrews' Ch., 14 John. 118) involving that right in private corporations—showing the absence of distinction in this respect between the two classes of corporations. In the case from 14 John. it was held that *assumpsit* would lie on the implied promise of the corporation arising from the act of its agent. And in Glidden v. Unity, (33 N. H., 577) where a municipal corporation was sought to be made liable upon the admission of its agent. The court held:

In all American courts, towns and other corporations are now to be considered as subject to the same presumptions and implications arising from their corporate acts, or the acts of their agents within the scope of their authority, without either vote, deed, or writing, as in cases of natural persons. X

—Referring to 2 Kent, 290, and Angell & Ames on Corp., § 212.

A private corporation is an organization allowed by government for the purposes of trade, commerce, internal improvement, etc., in order that associated capital under the protections and restrictions of law may accomplish the various ends for which private enterprise is inadequate. It makes contracts and pursues its business occupations just as private individuals do—its charter being the limit of its powers, in the same sense that the discretion of an individual is, practically, the measure of his capacity to act. If not restricted by its charter to particular modes of action, it can do anything by its authorized agent that it has the capacity to do as a corporate body, and the act of such agent will bind it as fully as an individual can be bound by the deed of his constituted attorney. (Story on Contracts, § 312; Bank of Columbia v. Patterson's Administrator, 2 U. S. Cond. R. 505; Hoyt v. Thompson's Ex., 19 N. Y. R., 217; Abby v. Billups, 35 Miss., 630; Alton v. Mulledy, 21 Ill., 79; Dillon on Mun. Corp., §§ 132 and 374; Story on Agency, § 54.)

+ Hitton V. Hamilton City 6 Nev 202.
Lovick V. Mayor 6 Heiskell (Tenn.)
605-6.

A public corporation is erected chiefly for political purposes, and is charged by the legislature with some of the functions of government. In so far as it is thus made by its charter the trustee of a public trust, it has no power to delegate the administration of *that* trust to sub-agents, as, for instance, the delegation by the City Council to one of its members of the power to administer alone the affairs of the city would be incompetent, it being beyond the ability of the Council to abdicate its functions of sovereignty. But in so far as the power of the Council relates to the performance of acts not involving the exercise of a *public* or *legislative* trust, it has the same capacity of action through agents that private corporations have, and is not distinguishable from them in the right to chose its mode of action, in the absence of a *particular* mode prescribed by the charter. While, then, we need not halt to question the exclusive power of the Council *as a government*, to exercise its legislative discretion as to whether street improvements are needed, and if so, where, it is most evident that the rule invoked by defendant was never meant to cripple the corporation in making the contracts required for the execution of the work, by denying it the privilege of availing of the energy, tact, experience and business capacity of individuals, chosen for their fitness for the task, who, in discreet discharge of their appointed duty, could

effect more satisfactory arrangements with contracting parties than the Council would be enabled to do in its unwieldy organic form. The making of a contract is competent to be performed by a municipal corporation just as it is by a private one, and the City Council may authorize the execution of such a power by an agent as thoroughly and effectually as a board of bank directors may require of, and impose on, an agent a like duty. The assumption that there is any distinction between the power of a private and a municipal corporation to make contracts through agents, unless restricted by the charter, is unfounded. In so far as the City Council is charged with the execution of a trust derived from, and peculiar to, its functions as administrator of sovereign powers, its discretion can not be shifted to another agency; but when the act authorized to be done by the Council is such an act as an individual could perform, or delegate the performance of to an agent—such as making contracts—it may perform *that* act by an agent.

In the case of Clark v. Mayor, etc., of Washington, 12 Wheaton, 40 (4, Cond. R., 425), the charter of the city gave it "full power and authority to authorize the drawing of lotteries for effecting any improvement in the city," etc. No specification of the mode, or of the agencies for the execution of the power, were indicated. The corporation, for the

purpose of carrying the power into effect, passed several resolutions, each for raising $10,000 by lottery for the several objects of endowing two public schools, of building a work-house and penitentiary, and a city hall, *and passed an ordinance appointing certain managers* whose duty it was made to arrange the lottery as they might deem best, and giving them "full power and authority to appoint all necessary agents, clerks and servants to do and perform all such acts and things as might be necessary to carry into effect the provisions of the ordinance." Other ordinances, amendatory of this, were passed from time to time, each directing the respective lotteries therein provided for to be conducted by agents to be appointed by the Mayor, and invested with the amplest discretionary powers in effectuating the purposes contemplated by the ordinances. Under the direction of one of these ordinances the Mayor appointed seven citizens—not members of the city government even—to manage the whole business of the lottery. These appointees made an arrangement with David Gillespie to sell him one of the lotteries. The holder of a ticket in this lottery sued the city. Defense made was that the city had transferred the particular scheme under which this ticket was issued, and was not responsible to the plaintiff. Chief Justice Marshall held otherwise, and decided the city responsible, because no transfer

in law *by the managers* to Gillespie was competent, and that it would be presumed, from the terms of the transaction, that the managers only intended to cede the profits of the lottery to Gillespie. While this was the point before the court, the opinion in the case dwells with peculiar emphasis throughout upon the proposition that *the managers appointed under the ordinance, with the fullest discretionary powers, were the agents of the corporation, and as such bound it by their acts.* The decision was not that the managers lacked any ingredient of power to execute the purposes contemplated by the ordinance, but that they could not be presumed to have intended *to sell to another the franchise of the corporation committed to their charge.* An obviously correct judgment; but certainly the very strongest judicial confirmation of the proposition before asserted, that a power conferred in general terms by a charter may be executed by such means as the corporation prescribes; and that a municipal corporation, like any other, may make valid contracts, involving large discretion, through the instrumentality of agents. The principle of the decision is perfectly clear; because not only were these *managers* incapable of selling the franchise of the city, but *the corporation itself* labored under a like disability. It must be noted that the city was resisting the plaintiff's recovery upon the ground of

its irresponsibility, and yet it never occurred to counsel or to the court, tho' both of the highest eminence, to suggest the *want of authority in the managers* to make the contracts under which plaintiff's rights accrued. I refer at length to this case, because I understand it is relied on as authority for the position that the City Council could not confer upon the Mayor and Street Committee the power to make contracts—although the charter of Galveston, like that of Washington, gives authority in general terms without prescribing the mode or details of its execution.

In a later case the same tribunal announced the identical doctrine of the case quoted upon the actual point involved. Plaintiff filed his petition in the lower court, claiming that he was authorized by the Legislature of Iowa to keep a ferry across the Mississippi river at Dubuque for twenty years, which privilege he alleged was exclusive; that defendants were running boats across the ferry, etc. Prayer for injunction. Defendants denied exclusive privilege of plaintiff, and claimed rights under a contract with the city of Dubuque, made in pursuance of the power vested in the Council by the fifteenth section of the charter, which confers, in general terms, power on the Council to license and establish ferries across the river at Dubuque, to fix the rates of the same, and to impose reasonable fines and penalties for vio-

lation of regulations on the subject. Plaintiff objected that the license could not justify defendants, as no ordinance of the Council granted it, *and the Council could only act by ordinance.* Court held: That the contract made by the Mayor under the authority of the Council was valid as an act of the corporation, and that the validity of the contract was not impeached by the general rule investing legislative power in the Council respecting the police of the city; that a contract made by agents of a corporation by parol, bound it; that if the form of the license had been laid down in the charter, or the mode of granting it, conformity thereto would be required, but otherwise a substantial compliance with the general direction of the charter was sufficient. (Fanning v. Gregorie, 16 Howard U, S. R. 532–3). The facts disclosed that the contract made with the de fendants by the Mayor was for valuable consideration—$100 per year.

In the case of Sharp v. Mayor, etc., New York, (25 Howard's Pr. R. 395–6–7), plaintiff obtained from defendants a lease of ground under authority by the corporation to the committee, who made the contract on the part of the corporation, fixed the terms of the lease, and made all the "negotiations" with the plaintiff on the subject. It appeared that a third party had a better title to the ground leased than the lessor and ejected the plaintiff therefrom

Whereupon plaintiff sued the city for damages for the misrepresentations made by its agents, the committee, pending the negotiations for the lease. The court held: That "*the general principle, that a corporation may delegate to agents the performance of any act which it can itself perform, is well established;*" that the corporation itself might have entered into negotiations respecting the leasing of the slip and have settled the terms, and therefore, it could confide that power to its agents, and that the agent of a corporation binds it by his acts just as any other agent binds his principal. And the doctrine is clearly declared: "That where a corporation has power to do some act, and, as incident to that act, to render itself liable for representations made in and about the doing of that act, it can appoint an agent to do that act, and from the mere fact of such appointment *the same powers will flow to the agent as if he had been appointed by an individual;* provided only that the powers so flowing could have been exercised by the corporation itself." The court not only held the committee competent to make the contract, but also competent to fix responsibility on the city by their misrepresentation—a stronger announcement still of the principle of capacity in the agent to bind a corporation by the exercise of his discretion in the scope of his appointment.

The principle was directly involved in a case in

Pennsylvania (Dickerson v. Peters, 71 Penn., St. R. 55), decided in 1872. The councils of the city and county of Philadelphia "resolved," that the Department of Highways were authorized and directed, "to enter into a contract with a power or powers, who shall be selected by a majority of the owners of property on Orthodox street from Frankford street to Tacony road, for the paving thereof." A dispute arising between contractors involving the question of which of them was entitled to the contract for the work, mandamus was resorted to by one of them to compel the awarding of the contract to him. It was held, that the discretion of selecting the power and making the contract was in the department, and could not be interfered with.

The following authorities were relied on by counsel below as maintaining the doctrine of the inability of the City Council to "delegate" to the Mayor and Chairman of Committee on Streets and Alleys the powers indicated by the ordinances:

Cooley on Const. Lim., p. 204, speaking under the caption, "Delegation of Municipal Powers," the learned author says: "Another and very important limitation which rests upon municipal powers, is that they shall be executed by the municipality itself, or by such agencies or officers as the statute has pointed out. *So far as its functions are legislative*, they rest iu the discretion and judgment of the municipal

body intrusted with them, and that body can not refer the exercise of the power to the discretion and judgment of its subordinates or of any other authority." To sustain the text, Mr. Cooley refers to the case of Thompson v. Scermerhorn, 6 vol. New York R., page 92. That was an action brought by the plaintiff to recover from the defendant the cost of "paving," etc., a street in the city of Schenectady, in front of defendant's lots. The decision of the case turned on the construction of the thirty-fourth section of the charter, which provides that the Common Council of the city is authorized to make "by-laws and ordinances, ordering and directing any of the streets * * * to be pitched, levelled, paved, flagged, macadamized or covered with *broken stone, gravel* or *sand*, or for the altering or repairing the same, *within such time, and in such manner as they may prescribe*, under the superintendance and direction of the City Superintendant." The council passed an ordinance directing State street, between certain points, "to be pitched, levelled and flagged * * * *in such manner as the City Superintendent, under the direction of the committee on roads of the Common Council*, shall direct and require." The court says the Legislature intended the city to *prescribe in its ordinances* the manner of the improvement, and it could not delegate to a committee the duty to use a discretion expressly conferred on the Council by the charter.

I certainly have no quarrel with this decision. Its justice is apparent. The charter not only required in so many words the use of the discretion of the council, but *named in terms the character and variety of materials to be adopted by the use of that discretion.* The ordinance should have embraced these prescribed requirements—it omitted both. The decision is upon the express ground of the failure of the council to pursue *an indicated mode* of improvement; and that it was charged by the Legislature with the exercise of sovereign power, which it attempted to delegate. And that is exactly what Mr. Cooley says, and I concede. But he no where says that a corporation, in the absence of specific restrictions in the charter, can not appoint an agent to bind it in any way outside the scope of its peculiar use as a branch of public government.

Smith v. Morse, 2 Cal., 524: Plaintiff was a judgment creditor of the city of San Francisco, and sought to set aside as a cloud on his title, (acquired by execution sales under his judgments) the claim of title by the defendants in certain property in the city, and to enjoin sale thereof by defendants. The City Council had created by ordinance a Sinking Fund Commission and through them conveyed to defendants, as "Commissioners of the Funded Debt," all the real estate of the city. It was held by the court that the charter of the city authorized no such

organization as the Sinking Fund Commission, either expressly or by implication; and the council could not in any event convey to a new department of government, *created by itself*, the trusts reposed in it by the charter to use faithfully the city property, and that the entire proceedings complained of by plaintiff were void, and vested no title in defendants. The charter in express terms prohibited the Common Council, any committee, or member thereof, from performing any executive or ministerial business unless *specially directed by law.*

I may very freely admit the law of this case without touching, remotely even, the point under discussion. It is a clear instance of the transfer by a corporation of a public franchise to another agency, not only without express or implied authority of the Legislature, but in the face of positive prohibition.

Day v. Green, 4 Cushing, 433: Trespass for taking away a building or plaintiff against the Mayor and Street Superintendent of Cambridge. Charter empowered the City Council to "make all such salutary and needful by-laws, as towns, by the laws of the commonwealth, have power to make," etc. Ordinance prohibited "the removal of buildings in the street, except by a license for that purpose, granted by the Mayor and Aldermen." Subsequently it was ordered in the Board of Aldermen "that the Mayor be authorized to grant licenses for

the removal of buildings over the public highways, etc., in all cases in which he may deem it expedient."

Defendants justified on the ground that the building was left by plaintiff in Harvard street, rendering it unsafe for travelers, and that defendants in their official capacities had moved the house, as they had a right to do. The plaintiff replied that he had put the house where defendants found it under a license granted by the Mayor. Defendants contended that the Council could not authorize the Mayor to grant a license *to encumber a highway*, and *could not legally do it themselves.* The Court held the defense good upon two grounds: 1st. That the encumbrance to the street by the plaintiff's house could not be justified as a common law right to the reasonable use of highways; 2d. That the power to *license* such removal of the house could not be delegated to the Mayor by the Council. The case may be conceded as declaring the law upon both grounds. It being an illegal act at common law thus to encumber streets, *the Common Council itself* could not authorize it except under special restrictions; and the granting of a *license* to encumber streets *being a pure act of sovereignty*, it should proceed from the whole corporate power.

Coffin v. Inhabitants of Nantucket, 5 Cushing, 269: A statute of Massachussetts establishing a fire department in the town of Nantucket, provided that

And defendant further alleges that no specifications by the city engineer or any other person of the work for which proposals were invited, or any part thereof, were ever on file or exhibited or could be seen
163 by calling at the said mayor's office from the date of said first advertisement up to the date of the contract with plaintiffs sued on.

And defendant further says that no specifications of the work for which proposals were invited by said advertisements ever were prepared by said city engineer; nor could any fair and good faith contractor acting reasonably on the basis of said advertisements ever have learned any specifications by which to regulate and govern bids or proposals for said work, and that the acts and proceedings of said mayor and chairman of the committee on streets and alleys, and the said contract with plaintiffs, were null and void for the want of any specifications or information whatever to enable bidders to know or understand the work to be competed for and done or performed.

And defendant further says that up to the 3rd day of February, 1874, no grade had been established by the city engineer; but that said ordinances attempted and intended to delegate to him the power to
164 establish such grade; which delegation was unlawful and void, and that no grade ever was established by said engineer.

Defendant further says that at the dates of said ordinances and of said advertisements by said mayor various sidewalks on the streets and within the limits designated therein had been constructed by the owners of lots fronting thereon which they claimed to conform to some of the standards attempted to be placed within the direction of the said mayor and chairman of the committee on streets and alleys. That the second section of the said ordinance approved Oct. 21, 1873, annexed to said plea No. 6, attempted to delegate to the street superintendent authority to determine which of said sidewalks were of proper materials and conformity to grade, and to give notices as therein provided, which was a further unlawful delegation of authority, and rendered said ordinance and the ordinance to which it was an amendment null and void; and the same is specially pleaded to all that part of plaintiffs' suit based upon the authority conferred by said ordinances, and the contract for sidewalks specified therein.

165 Defendant further says that said street superintendant never gave the notices in writing provided in said section. That the said advertisements by said mayor only related to such sidewalks as had not been filled and paved by the property-owners, being thus indefinite, uncertain, and affording no sufficient legal basis for any valid contract by said committee. That the bid and proposals by said plaintiffs, copy of which is annexed hereto, was for all uncompleted sidewalks within the fire-limits and the walks upon the avenues and streets therein mentioned. Whereas said contract included all the sidewalks on all the streets and avenues within the limits specified in said ordinances, in disregard of the terms of said advertisements and said bid or proposals, and being thereby unauthorized, fraudulent, and void. That after said advertisements by said mayor, as hereinbefore set forth and shown, and having received the bid and proposal from plaintiffs, of which a copy is annexed hereto, the said mayor and chairman of the commitee on streets and alleys made with said plaintiffs the pretended contract sued
166 on, providing that said Hitchcock & Co. obtain the written consent of the owners of the property fronting or abutting upon the said sidewalks to the laying down of the pavement, which written consent or selection of the said pavement shall be filed in the mayor's office with

the city clerk; which condition was wholly unauthorized by said ordinance, and was in violation of the said advertisements and bid or proposals, and was an incomplete and unauthorized execution of an entire power; the said contract was fraudulent, null, and void.

And defendant further says that the only authority ever given by defendant for the issuance or sale, negotiation or disposal in any manner of any bonds or obligations of defendant for the purpose of improving sidewalks by filling, raising, paving, and curbing the same, upon the creation or issuance of any bonds, or any debt whatever for or relating to any improvement of sidewalks in said city, was such as is contained in the said ordinance of August 19th, 1873, being Exhibit No. 2,
167 annexed to defendant's said plea No. 6, and also annexed to plaintiffs' amended petition, (not admitting here by the validity of said ordinance.) That the said mayor and chairman of the committee on streets and alleys causing the city council to believe that all the sidewalks specified in the said ordinances of August 19th, 1873, and Feb. 3, 1874, could be graded, filled, curbed, and paved with the proceeds of said bonds for $250,000, or by the disposal thereof, the said ordinances were passed and adopted, and also the other ordinances annexed to said plea No. 6 and to plaintiffs' amended petition; that said advertisements were made by the mayor, as heretofore set forth, and the bid or proposals of plaintiffs was made, copy of which is annexed hereto, and said pretended contract made by said mayor and chairman, which is sued on; all of which contemplated the complete grading, filling, curbing, and paving of all said sidewalks specified in said ordinances to be paid from said bonds for $250,000; that no specifications, estimates, or computation of the amount of filling or curbing or of paving necessary
168 for construction of said sidewalks, or any of them, and no statement of grade on any of said streets or avenues, was ever made by the city engineer or obtained by said mayor or chairman, all said matters, by the action of said mayor and chairman, being left thus general, uncertain, and indefinite; that the said pretended contract made with plaintiffs was not reported to the city council, and was never in any manner approved, acquiesced in, or ratified by said council, all the proceedings and actions of which will be shown to deny and repel all averments of ratification, and all the allegations of plaintiffs in that behalf are expressly denied; that the terms of said contract becoming known to the council through unofficial sources, and also the gross improvidence, abandonment, and violation of duty involved therein, as shown in the petition of plaintiffs, and in the enormous, extortionate, and unconscientious profits to plaintiffs thereby obtained, as defendant believes and charges, by positive fraud and malpractice on the part of plaintiffs, the exact particulars of which are concealed, but which
169 defendant believes it will develope and expose by the examination of plaintiffs and parties concerned, and therefore cannot be exactly stated. And it also becoming known to defendant that the contract made by said mayor and chairman with the plaintiffs and others, made at same time for the sidewalk improvements provided for in said ordinance of August 19, 1873, were at a cost largely in excess of the said $250,000 in bonds of the city, nearly to more than $300,000, and that the contract with plaintiffs which for payment it referred alone to the said sidewalk-improvement bonds for $250,000 actually amounted to bonds for at least the sum of $477,000; with contracts with other parties for a part of said sidewalks, not included in the contract with plaintiffs, amounting to largely over $500,000 in the bonds of the city; whereas no bonds had ever been authorized, except as afore-

the firewards chosen in pursuance thereof should organize themselves into a board and appoint three of their number as directors to have the general direction of all the operations at fires, and authorized the board to make by-laws for certain purposes *specified in the law*, *not* embracing that of empowering a single member to exercise the authority of the board. The directors made a by-law authorizing one director in urgent cases to exercise the power of the whole board; and one director afterwards, acting under this by-law, blew up the plaintiff's house with powder, and for the damage resulting therefrom plaintiff sued the town. The Court held there was no liability of the town to the plaintiff; that the board of firewards *were not a corporation*, and had no authority to make any by-law, *except* upon the very subjects embraced in the act of the Legislature. No comment is needed to show the inapplicability of this case to the case at bar.

Ruggles v. Inhabitants of Nantucket, 11 Cushing, 433.

This case, in fact and law, is not distinguishable from the one last reviewed.

Hyde and Goose v. Joyce, 4 Bush., 464:

Section 4 of the charter of Louisville provides that, "*hereafter said general council may pass ordinances* to procure the grading * * * and furnishing with metal gutters, or regrading, repair-

ing, * * * * and furnishing with metal gutters, the whole or any portion, in width or length, of the sidewalks on any square * * * within the city limits, or such one or more of the modes of improvement thereof, as the said Council may direct or authorize to be done." In supposed pursuance of this power an ordinance was passed "to grade and pave the sidewalks on the west side of Fulton street, * * *or such portion of said sidewalks as the City Engineer may direct.* It provides that such portions of the sidewalk as the City Engineer might direct should be graded, etc., subject to the supervision and control of the City Engineer; and according to his specifications, work was done under a contract made in pursuance of this ordinance, and the property owner refusing to pay his assessment therefor, was sued. The court held the action could not be maintained, as the power to indicate the mode and manner of improvement was specially confided to the corporation, and could not by them be delegated to the Engineer and made subject to his direction; and that the power was legislative and *sovereign*, and incapable of delegation on that account. It will be observed that the charter directed ordinances to be passed, defining the locality and character of the work; while the ordinance not only failed to prescribe these particulars, but was even more general in its form than

the charter. Nor should it pass unnoticed that the *Mayor and Engineer* "let out the work," and no defense was interposed in the suit, based upon their incapacity to perform *that* duty.

North. Cent. R. Co. v. Mayor, etc., of Baltimore, 21 Md., 105:

The railway company was proceeding to make grade and build its road through the city of Baltimore without the assent of the Mayor and City Commissioner, who had been invested by *ordinance* with the duty of supervising the work and controlling the grades. These powers were placed by the *charter* in the city corporation. In a suit by the city for injunction against the railway company, it was contended by the latter that the Mayor and Commissioner had no power to exercise functions devolved by law on the corporation. The court held: "The rule "*delegatus non potest delegare*," does not apply. The corporation can act only by its officers and agents; and it was not only competent but eminently proper for the Mayor and City Council, by ordinance, to designate and appoint the officers or agents to carry out and enforce its provisions."

I regard this decision as direct authority against the proposition to support which it was cited.

I fail at this time further to recall cases relied on below by the other side to the point now under discussion.

City of Covington v. Boyle
6 Bush 204.

Fairness, however, requires me to say that many cases have come under my own observation, which have sometimes been cited as being adverse to the view I here seek to maintain. (Ruggles v. Collier, 43 Mo., 353; St. Louis for the use of Murphy v. Clemens, Id., 395; Sheehan v. Gleason, 46 Id., 102; 13 Cal., 540; 2 Swan (Tenn.), 364; 50 Ill., 28; Williams v. Davidson, 43 Tex., 29). But examination of these cases will, I think, show, that they clearly sustain the distinction I have attempted to indicate between the delegation of a legislative discretion and the imposition of a duty upon a ministerial or execute agent to be performed in a direction already marked out by the legislative power.

They generally present clear cases of an effort on the part of the municipality to invest individuals with the substantial functions of government or with public franchises competent to be granted by the legislature alone.

It is noticeable too, that the cases from Missouri are all suits by contractors claiming to have performed public work against private citizens *not parties to the contracts*, seeking to enforce special assessments upon property adjoining the alleged improvements, by virtue of contracts *made with the municipalities*. In such proceedings it is evident that the strictest compliance with all the requirements of the

statutes must precede the accrual of any right of recovery.

Not so, it seems to me, is the case where *the corporation* is sued *directly* for the breach of even a defective contract, under which the plaintiff had performed labor and supplied materials in good faith, and the fruits of the combination of such labor and materials were retained by the corporation.

But after all the cases are considered does it appear that their learning can be of service or application in view of the terms of *this* contract? Does that instrument leave any room for the exercise of discretion by the Mayor and Chairman of the Committee on Streets and Alleys? The streets to be improved by the construction of sidewalks on their borders are named in the ordinances. Several materials are selected by the Council and named in the ordinances as fit for the work contemplated—each being the result of that body's "discretion." Nothing was left to the Mayor and chairman of committee to exercise *their* discretion about but the fixing of the price for the work, and this *the market* afforded the measure of. If they abused this power corruptly the wrong may be reached by plea, but not by demurrer.

Who could best arrive at the real value of the work?

Could the Council fix it as well as a committee

charged with the special duty? Certainly the supposed rule, or rather its supposed application, must have its limit somewhere. In one sense of the word no act, however trifling or "ministerial," can be performed without "discretion." The Sheriff is known by all systems to be a ministerial officer, and yet he is in the constant exercise of judgment in every official deed. He must execute the most ordinary process that comes to his hands at his peril. He can't take A's property under execution for B's debt without incurring the penalty of law for the mistake; and everywhere, and at all times, he is confronted with the necessity of *deliberating—judging*. The City Engineer is a ministerial officer, and yet he is constantly involved in the need and the use of discretion. Suppose a contract is made by the city for shells, and it is therein provided that they are to be delivered as the Street Superintendent directs; and suppose that officer directs them to be cast overboard on the flats, and during the night they are stolen. Could the city resist the suit of the contractor for the price of the shells, on the ground that the Superintendent of Streets, in attempting to receive the shells, and exercising his discretion as to the place of delivery, did an act only competent for the corporation to do, and therefore beyond the latter's power to authorize him to do? If this principle, or any one remotely akin to it, is to prevail as

the law of corporations, their usefulness will soon have become a tradition.

For example: The rules that govern the City Council of Galveston and that have been practically the directors of its proceedings from time beyond present average memory disclose, what the operations of all such bodies must show—a *government by agencies.* At this time there are no less than thirteen standing committees upon all the various subjects touched by the administration of city government, and the rules provide for the creation of any number of *special* committees by the Council, whenever its business may require additional agencies for its execution. In the light of common information and every day experience it is difficult to understand how, under a rule so unreasonable and impracticable as that suggested by the argument, it were possible to conduct even the ordinary affairs of municipal corporations.

As connected with the main question of power in the committee to make the contract, it was urged by counsel in the court below, that since the petition showed authority for the issuance of bonds for sidewalk improvements only to the amount of $250,000, (ordinance of 19th August, 1873, *supra*) and the contract made by the committee could not be performed by the city without the issuance of a much larger amount in bonds, *therefore*, even

granting the power to contract was conferred upon the committee, it appeared that the *execution* of that power had been in excess of the grant and was void.

The obvious answer to this suggestion is, that the same power which authorized the issuance of $250,000 in bonds, could, when necessary, enlarge the amount. If under the charter, it could perform the one act it is clear that by the same authority it could perform the other.

The case would be the same if no bonds whatever had been provided for at the date of the contract, since the city the next day, or the next week, could have placed itself in position to perform its part of the contract by ordaining the issuance of the bonds necessary for that purpose under the powers conferred upon it by the charter.

The Council certainly authorized the contract to be made, and indicated what work was to be done; and it just as certainly fixed no restriction upon the amount to be paid for the work. It did not say to the committee, "You may contract for this work, provided the cost of it does not exceed $250,000 in bonds already authorized by ordinance." On the contrary, it said, "You may contract for this work, and it shall be paid for by bonds issued in pursuance of authority vested in the city for that purpose—irrespective of any provision heretofore made

by ordinance for the issuance of bonds for that character of work."

It is inconceivable that the city would undertake with a fund of $250,000 to accomplish work worth, according to the argument of counsel, three times that sum.

The sum already provided for was sufficient to sensibly advance the contemplated work, and there was no need for further provision until that sum should be exhausted; whenever necessary the city could again ordain issuance of bonds to complete the improvements contracted for.

Certainly the defense urged could not obtain, to say the least, so long as the sum of bonds authorized by the ordinance should remain greater than the damages sustained by the city's breach of its engagement. It might be presented with more plausibility (though with as little justice) if the plaintiffs were seeking to recover an amount in excess of the $250,000 expressly authorized by the ordinance.

Second.

It is denied that the contract was *capable* of ratification by the City Council, and, if capable, that such ratification is adequately alleged.

Mr. Dillon (Mun. Corp., § 385), declares that:

> A municipal corporation may ratify the unauthorized acts and contracts of its agents or officers which are *within the corporate powers*, but not otherwise. Ratification may be

inferred from acquiescence after knowledge of all the material facts, or from acts inconsistent with any other supposition. *The same principle is applicable to corporations as to individuals.*

The learned author in a note to the section quoted cites many cases to the proposition affirmed in the text.

It is elementary that a ratification once made has the same effect as an original authority, to bind the principal, not only in regard to the agent himself, but in regard also to third persons. (Story on Agency, § 244); and that such ratification deliberately made, with a full knowledge of all the material circumstances, can not be recalled (Id. § 242).

The fact of ratification may be established in various ways, as by express assent to, or confirmation of, the agent's act; any proceedings of the principal *in pais*, such as the holding and enjoyment of the result of the agent's act—silence, or acquiesence without objection—conduct inconsistent with any other supposition than that of ratification, etc., etc., (Hoyt v. Thompson, Ex. 19, N. Y., 218). Slight circumstances and small matters may suffice to raise the presumption of ratification, and where the evidence is doubtful the least that should be done is to submit the question to the decision of the jury. (Story on Agency, §§ 253–255). In many cases ratification will be inferred from the mere habits of

Peters v. Mayor 1 N. J. 253-7.

dealing between the parties, even where the course of dealing between them may not amount to satisfactory proof of an original authority. (Id. § 260).

First then, could the act of the committee be legally ratified by the council? If the act done by the committee was one within the corporate powers—that is, if the council itself could have made the contract—there is an end to the question of power to ratify. Certainly, the council could have made a contract for the improvement of the sidewalks of the city—it was expressly authorized to make such improvements by the charter. I pass, of course, the question of the form of the contract, that is whether the city could undertake to pay for such improvement by the issuance of bonds—assuming for the purpose of the argument on this point that it could so contract.

The council not being restricted by the charter to any particular mode of making contracts, was, consequently, equally unrestrained as to the manner of signifying its ratification of those made by its agent, and there can be nothing in the objection that such ratification could be effected only by ordinance or resolution. These cases (Zottman v. City of San Francisco, 20 Calif., 96–108), in which it is said that an act incompetent to be done by a corporation except upon certain precedent conditions, as the giving of notice, or the like, can

not, when done by an agent, *without compliance with such conditions*, be ratified by the corporation, have no application to this case. I concede the law announced by those cases. They proceed upon the correct theory that since the corporation *itself* could not perform the act without first complying with the precedent conditions imposed by law, it could not subsequently ratify the act of its agent by whom such conditions had not been observed.

In the second place, the *power* to ratify being assumed, does the petition allege sufficient facts to establish ratification? It were needless here again to recite the allegations to that point. It suffices to say, that it is alleged that the City Council not only by the acts of its authorized members *in pais*, but by regular vote under its own rules adopted a report made by its own special committee appointed for the very purpose, whereby it affirmed and declared binding upon the city the contract in question—and this after full knowledge of all the facts acquired deliberately with the sole view of affirming or disaffirming the contract.

Language could scarcely aver a ratification in terms more distinct and emphatic. X

It will be borne in mind that the lower court took no such view as that advanced by counsel on this subject. There the averment of ratification was not

X Peterson V. Mayor 1st N.Y. 495
Pixley V. T.S.R.R. Co. 33 Cal. 191

considered, for it was an immaterial question after the court had assumed that the council had no power *itself* to *make* the contract. If it could not make, it could not ratify.

In aid of the allegation of ratification plaintiffs averred that the uniform usage and custom of defendant was, and had ever been, to make contracts through committees of its council, and that this custom had prevailed so long and been so universal that defendant was estopped to assert the invalidity of contracts made in conformity therewith. The proposition involved in this averrment is, in some of its aspects, closely allied to the doctrine of ratification relied on, and may be properly presented here.

Mr. Sedgwick (Const. of St. and Constit. Law, 215), accords to "usage," in arriving at the construction of statutes, a value similar to that of legislative exposition and judicial construction; and Mr. Dillon (Mun. Corp., § 57), says:

* * * General and long continued usage is not without its importance, and usage of this character may be resorted to in aid of the proper construction of the charter or statute, but no further. If the language be uncertain or doubtful a uniform, long established and unquestioned usage will be regarded by the courts in determining the mode in which powers may be exercised, and to a reasonable extent in determining the scope of the powers themselves.

In Bulkley v. The Derby Fishing Co. (2 Com.,

252) it appeared that, by the charter of the defendant corporation it was provided that "all policies of insurance made by said company, signed by the president, or, in his absence, by the assistant, *and countersigned by the secretary*, shall be binding on said company according to the terms and tenor thereof."

On the trial of an action on a policy of insurance of a ship, the plaintiffs used in evidence a policy, corresponding to that declared on, signed by Canfield Gillet, as president, and countersigned by Nathan Wheeler, as assistant. The defendant objected to the policy going to the jury because it was not countersigned by Samuel J. Andrews, who was secretary of the company.

To obviate this objection, and to show that the defendant had adopted the policy, the plaintiffs offered to read the correspondence between the parties at the time of effecting the insurance; the notes given for the premium by the plaintiffs; the book of records of policies of insurance on vessels, kept by defendant in which were recorded two or three policies, attested by the clerk of the company, and not by the secretary, and a number of others, signed by the president, and countersigned by the assistant, like the one sued on. Objection to this evidence made by defendant was sustained, and there being no other evidence on plaintiffs' part,

the court directed a verdict for defendant. On appeal the question was, whether plaintiffs should have been allowed to make the proof offered. It was held, that corporations may disregard the literal regulations of their charters in regard to the mode in which they are to transact their business and render their engagements obligatory—that if with, or without, a vote a corporation should introduce a usage and practice in the transaction of its business different from that prescribed by law, it would be liable for any claim growing out of it; for, though such conduct be improper in itself, the corporation can not take advantage of its own wrong to avoid its contracts—that it can not be supposed that those dealing with it know of its deviation from the charter, and it is presumed to act according to law—that whatever its forms of obligation, if, according to its charter, *or its known usage and practice*, it is binding. The court thus concludes its opinion:

A corporate act is not required in all cases. *It is sufficient if there be a usage and practice* under such circumstances as may be presumed to be within the general knowledge, and by the consent of the company. * * * In the present case, it appears to me that the evidence offered conduced to prove that it was the usage and practice of this company to underwrite policies of insurance and draw bills of exchange in the form now under consideration; and, of course, that it ought to have been admitted.

To same point is Witte v. Derby F. Co., same volume, 260. In Maryland (Frazier v. Warfield, 13 Md., 279) the same question was presented in determining the construction of a statute. For years the usage in Baltimore was, in weighing wheat, to weigh only one bushel in every sixty. This usage prevailing, the Legislature passed a law requiring *all* wheat to be weighed. It was contended on one side that the law required *every* bushel to be weighed, and was passed in view of, and to correct, the custom; on the other, that the enactment was made with reference to, and as confirmatory of, the usage. The court held, that if the meaning of a statute is uncertain or doubtful *usage* may be resorted to to explain and interpret it; and that the construction given to the law by common usage is to be considered in arriving at its meaning. The court adopted the construction made by usage.

III.

It is perhaps proper to say that as matter of public history there has been no uniform usage by the legislature of Texas, either to authorize the issuance of bonds by the City of Galveston by special acts, or to ratify ordinances of the city authorizing such bonds. Some bonds have been authorized by such action while some have not. The proportion of the two classes

is about equal—so that it is difficult to derive any satisfactory theory of legislative exposition of the city's corporate powers, in this particular, from the practice of the legislature.

I think it may be fairly claimed however, that the dates of all such confirmatory acts as *have* been enacted by the legislature (as for instance, Art. XI, Title X of the charter herein discussed, validating ordinances of 1869 providing for the issuance of bonds), indicate either, (1) that such acts were due to the troubled and uncertain status of *all* interests in the South under the local governments that attended military rule after the war—making southern securities the objects of especial distrust among capitalists everywhere; or, (2) to the alarm created among the holders of such securities by the very decision now sought to be reversed.

But were it conceded to be the uniform rule in Texas to authorize the issuance of bonds by municipal corporations by special acts of the Legislature, no absence of the power independent of such special authorization could for that reason be assumed by the courts.

This point was presented and relied upon in the Wisconsin (Mills v. Gleason) and New York (Ketchem v. City of Buffalo) cases already quoted.

It is disposed of by the court in Wisconsin in the following terms (11 Wisc., 491-2-3):

* * * But an argument against the right is derived from the practice which has prevailed to a considerable extent, of obtaining special acts of the Legislature, authorizing the procurement of loans by municipal corporations, and the issuing of bonds or other securities in payment. We are not aware to what extent, if any, this practice has prevailed in this State, as to loans for purposes clearly municipal, and authorized by the charter; but it seems to have been resorted to sometimes, even in such cases, in other States. The argument drawn from the assumption on the part of the Legislature of the necessity of such acts, is one always entitled to consideration, and sometimes of much weight, though never conclusive; and we think, owing to the peculiar nature of the subject matter, that in cases involving a loan by corporations, it is of less force than in almost any other, for capital is of a timid, jealous disposition. It delights in certainty and is alarmed by doubts. It has been heen held with great strictness, that corporations can exercise no powers except those granted by their charter. When, therefore, the charter does not expressly give the power of borrowing money, even though it grants powers to which this might be claimed as incident, yet there is room for doubt, a chance for an argument, and that being so, it might, as a matter of policy, facilitate the loan by removing all uncertainty by an express act of the legislature. And the fact that such acts have been passed, being then clearly necessary, when these corporations have been authorized to issue bonds in aid of purposes outside of their charters, may have had a tendency to induce a resort to the same practice when the bonds were issued for some purpose authorized by the charter, though in that case such legislation may not have been necessary. For these reasons we think there is nothing in this practice sufficient to overthrow the general rule, that in the absence of restrictions, a corporation authorized to contract debts and to execute undertakings requiring money, may borrow money for those purposes, and issue its bonds or their obligations therefor.

This question is alluded to in Ketchem v. City of Buffalo, 4 Kern., 356, and the court held that the fact that in several other instances, the legislature had expressly granted power to corporations to "purchase market lots," did not justify the conclusion that the city of Buffalo could not exercise the power as incidental to the general power of establishing a market. The court held that under that general power, it might purchase the lot on credit, and issue its bonds in payment.

I have undertaken to present the argument for the plaintiffs in error chiefly by suggesting and attempting to refute the propositions supposed to be relied on as authority for the judgment against them.

The necessity of anticipating the argument of my brethern on the other side has exacted of me a more extended discussion of the case than I could have desired, but not more than I have felt it my duty to indulge. The defense rests, in one form or another, upon the much abused and often misapplied doctrine of *ultra vires*—a doctrine fruitful enough of hardship, even when tempered with the wisest and most considerate judgment, but assuming the most appalling forms of injustice when released from its proper limitations.

Of late years it has assumed such proportions as to justify a learned lawyer of The Temple in preparing a text book (Brice's Ultra Vires) devoted exclusively to its consideration; and it seems to me

that I can not more pertinently conclude this argument than by citing his reflections upon it as a factor in legal science. In his preface to the treatise referred to the author says:

The doctrine of *ultra vires* is of modern growth. Its appearance as a distinct fact, and as a guiding, or rather misleading, principle in the legal system of this country (England), dates from about the year 1845. * * *

From disputes in which the only persons concerned were the corporations themselves and their own members, and in which the decisions might have been based upon the principles of ordinary partnership, the courts went further, to matters which involved the rights of outsiders. First, Turner, V. C., restrained a railway company from engaging in a trade in coal, and in doing so, he distinctly stated and expressly founded his jurisdiction upon the doctrine of *ultra vires*.

Then the doctrine was extended to transactions of every description where doubts could exist, or by fine drawn reasoning be raised, as to the business peculiar to corporations, or the special powers, express or implied belonging to them. As one result, not unseldom has it been called into requisition to relieve a company from a contract of which it may have had the benefit, but which it finds convenient to repudiate.

It is thus the creature of purely judicial decision. It was originated by the courts *proprio motu* upon grounds of public policy and commercial necessity, and to meet and provide for circumstances which called for the intervention of some strong head, but for which the State had not provided. Being so originated, and as most will probably admit, wisely originated, and in the best interests of trade and commerce, it has however, become *a species of Frankenstein*. The tribunals have created; but they have confessed themselves powerless to control the operations of the principle which they

have called into existence, or even to systematize its effects. In consequence, the doctrine of *ultra vires* is constantly cropping up in unexpected quarters, and manifesting its effects in an unforeseen and unwelcome manner. One of its first onslaughts was upon the time-honored maxim of the common law that a man can not stultify himself—that the lunatic, the fool, the drunkard, and the knave, who have made a contract, shall not subsequently repudiate the same by alleging that neither they nor their agents had at the time sufficient brains or authorization to make it. This maxim the doctrine of *ultra vires* soon demolished, and corporations may set up their incapacity whenever it is inconvenient for them to carry out their engagement.

It next ran full tilt against the less rigid, but more equitable principles laid down by the courts of Lincoln's Inn. "Who seeks equity must do equity," and "Who comes for aid to Chancery must come with clean hands," are two of the most elementary principles of the Chancellor's jurisdiction. But the new doctrine refused to allow them to be applied to corporations, and after much wrangling, it came off victorious, and corporations can now be relieved from *ultra vires* contracts, and yet keep the benefits thereof.

Another rule was found to hamper the development of the doctrine, and to impose some check upon the license assumed by corporations in their dealings. "*Qui facit per alium facit per se*," is the basis of the law of principal and agent, and it has hitherto been deemed a very useful and common sense rule, as sound and rational when applied to the complex transactions of trade and commerce, as to the ordinary intercourse of every-day life. But the doctrine of *ultra vires* objected to its restraint, and made a desperate stand to be relieved from it. Here, however, the common law maintained its supremacy, though, *mirabile dictu*, equity yielded, so that there is now to be seen the strange analogy that corporations may be liable at law under circumstances where Chancery imposes no liability,

and that what the former says is palpable fraud, the latter will often pass over, or at least admit its inability to punish.

Besides these anomalies, there is the uncertainty that shrouds the application of the doctrine * * * As a necessary result the decisions and *dicta* upon this subject are very conflicting, and some absolutely irreconcilable, while the principle itself is become, if not an excrescence upon, at least a very disturbing element in the legal system.

F. CHARLES HUME.

Counsel for Plaintiffs in Error.

2 Pairs on Cart 5 19/40 (6th lot)

168.

In Supreme Court of the United States.

October Term 1877.

D. G. HITCHCOCK & CO.,

PLAINTIFFS IN ERROR,

vs.

THE CITY OF GALVESTON,

DEFENDANT IN ERROR.

From the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

W. P. BALLINGER,

of Counsel for Defendants in Error.

In Supreme Court of the United States.

D. G. HITCHCOCK & CO.,
PLAINTIFFS IN ERROR,

vs.

THE CITY OF GALVESTON,
DEFENDANT IN ERROR.

From the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

This suit was brought by the plaintiffs in error against the City of Galveston on a contract made by plaintiffs with the Mayor and Chairman of the Committee on Streets and Alleys of said city, on the 28th of February, 1874, by the terms of which the latter bound the city to pay plaintiffs with bonds of the City of Galveston, styled "Galveston City Bonds for Sidewalk Improvements," to be taken at par, $1.75 for each square yard of paving to be laid upon certain designated sidewalks in said city, "Provided, however, that the said D. G. Hitchcock & Co. ob-

tain the written consent of the owner of the property fronting or abutting upon the said sidewalks to the laying down of the said pavement, which written consent or selection of said pavement shall be filed in the Mayor's office with the City Clerk;"—$1 25 for each and every cubic yard of filling necessary and needed to be done upon any and all of the said sidewalks preparatory to the laying of pavement thereon. The said price is to include and cover not only the filling, but the grading, tamping and rolling;—45 cents for each and every square foot of wooden curbing, &c., needed or used in filling up and grading the said sidewalks, preparatory to putting down of said pavement, or any other;—9 cents for each and every lineal foot of wooden curbing needed and used in putting down said six foot pavements, or any pavement six feet in width. Plaintiffs bound themselves to do said work, to commence it in thirty days and finish it without unnecessary delay.

The petition alleges that plaintiffs completed certain curbing for sidewalks amounting to $15,-565 63, and certain filling amounting to $2,628, in the aggregate to $18,193 63; had purchased materials, &c., &c.; were engaged in and would have performed their contract, when the city declared the contract void, and put an end to its

further execution. They allege that they would have made profits on the unfinished "filling" 65 cents per cubic yard amounting to $60,676 91; on the "edging" 6 cents perfoot, $15,366; on the curbing, $31\frac{61}{100}$ cents per square foot, $51,941 18—making due plaintiffs, in the aggregate, for the profits they would have realized on said work, $127,990 57, for which amount, added to the $18,193 63, they sue and pray judgment, and also "for general damage," $50,000.

Defendant, in accordance with the requirement in Texas to file all defenses at the same time, demurred to the entire complaint and to the several parts thereof, and also answered setting out the only authority under which said contract was made, and setting up defenses thereto; whereupon the plaintiffs amended, joining in the averments as to the charter and ordinances constituting the authority under which they claimed said contract to be obligatory on the city, alleging also its ratification by the City Council by certain specified acts, and that the mode of contracting was in accordance with the usage of the City Council in making contracts. Defendant renewed its demurrer, and added further grounds thereof. The case was heard before Justice Woods, the demurrer sustained, amendment made, not avoiding the demurrer, and the suit dismissed. The

decision of the court will be found in 2 Woods' Circuit Court Reports, 272.

The grounds of demurrer, the provisions of the charter, which is a public law of the State, the ordinances of the city, and other allegations of the petition, will be set out more specifically under the several heads of argument, to sustain the decision of the court below.

POINTS AND AUTHORITIES.

First. *The City of Galveston had no lawful power to execute, issue or bind itself by the said bonds for sidewalk improvements.*

The bonds in which plaintiffs were to be paid were bonds styled "Galveston City Bonds for Sidewalk Improvements." (Record, p. 71.) Coupon bonds payable to ———, or bearer, in fifteen years, with ten per cent. interest annually. (Record, p. 79.)

Plaintiffs assert the power of the City of Galveston to issue such bonds to be inherent in its character as a municipal corporation.

Critical discussion of the various authorities on this subject is not deemed useful or appropriate to this case. They are in conflict, and that conflict has been recognized by this court, and the

rule adopted which the court considered to be sound in principle and salutary in effect.

In Police Jury v. Britton, (15 Wal., 566,) this court say:

"We have the question directly presented in this case, whether the trustees or representative officers of a parish, county, *or other local jurisdiction*, invested with the usual powers of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, have an implied authority to issue negotiable securities, payable in future, of such a character as to be unimpeachable in the hands of bona fide holders for the purpose of raising money or funding a previous indebtedness. This subject, as applied to *various municipal bodies*, has been much discussed in the courts of this country, and various conclusions have been reached, depending sometimes upon the peculiar character and statutory powers of the corporation, sometimes upon the character of the objects to be attained, and sometimes upon the naked implication of power supposed to arise from the express power to make expenditures. A collection of the cases may be found in Dillon on Municipal Corporations, section 407, note."

The court arrives at the conclusion that they have no such "implied authority."

It is claimed that the above case is not applicable to the implied powers of a city corporation. We are satisfied that no such distinction can be rightfully assumed. The reasoning throughout on which it is based applies with increased force to city corporations. Their jurisdiction comprises a far greater variety and extent of

matters, much more specific, minute and detailed, with greater exposure to temptations. If, for the performance of each and all these duties, they possess the inherent or implied authority to pledge the negotiable credit of the city, unlimited in amount or time, no more frightful tyranny has ever existed or can be contrived.

The Mayor v. Ray, (19 Wal., 468) brought into discussion the powers of city corporations. The court say, that "the cases on the subject are conflicting and irreconcilable. It could not serve any useful purpose to make an elaborate review of them." The syllabus by the reporter, which is believed to be strictly accurate, is,

1. "That municipal corporations have not the power, without legislative authority expressly or clearly implied, to borrow money or to issue notes, bills or other securities of a commercial character free from equitable defences in the hands of bona fide holders.

2. "That such corporations are of a public character, instituted for purposes of local government and constitute part of the domestic government of the State: that the power of taxation is given to them for the purpose of raising the means of carrying on their functions, and that the creation of such special power is exclusive of others."

Argument or authority to vindicate these opinions would be misplaced. Every consideration for and against them is present to the minds of the court. I could not strengthen or remove

either. But I can with the fullest confidence claim the conclusiveness as applicable to this case. This is a Texas case. It is to be decided upon what your Honors, on your conscience, shall believe to be the law of Texas. Whatever conflict may have existed on the general subject among the members of this court, whatever differences might exist, if you were considering the subject at large, the Supreme Court of Texas took the promptest occasion to mark with its approval, and to confirm as authority, the opinion pronounced by Mr. Justice Bradley in the Mayor v. Ray. (See Williams v. Davidson, 43 Tex., 1, 34.) It is in accordance with the constitution of this court to seek, with all its judicial acumen, to give effect to the law of the State in determining the powers of the subordinate instrumentalities of the State, whether to be found in its statutes or its settled jurisprudence. What law can there be in this case except the law of Texas?

In no other State in the Union have there been, throughout her entire existence as Republic and State—over forty years—so many organic restrictions against corporations, or is the rigorous judicial construction of their powers so imbedded in the law of the land. This is historical. It is in the spirit of this legislation and this jurisprudence that the court below used the expression

that it followed the decision of Mr. Justice Bradley "with willing steps." I do not think a doubt will suggest itself to any member of this court as to the law of Texas in this case.

"A suit here merely changes the forum, and does not change the law of the case, or the rights of the parties." (C. J. Taney, 13 How., 579.)

Second. *The contract to pay for Sidewalks by the negotiable Bonds of the City was in contravention of the Charter of the City of Galveston.*

The Charter (Act May, 16, 1871, 12th Legislature, p. 362, Title X, Art. 30,) is declared to be a public act, of which judicial notice shall be taken.

Title IV—"Of the City Council—Its general powers and duties;" Art. III §8 thereof provides,

"To establish, erect, construct, regulate and keep in repair bridges, culverts and sewers, sidewalks and causeways, and to regulate the construction and use of the same, and to abate and punish any obstruction or encroachments thereon; and the cost of the construction of sidewalks shall be defrayed by the owners of the lot, or part of lot, or block, fronting on the sidewalk; and the cost of any sidewalk constructed by the city shall be collected, if necessary, by the sale of the lot, or part of lot, or block, on which it fronts, together with the cost of collection, in such a manner as the City Council may by

ordinance provide; and the sale of any lot or part of lot, or block, to enforce collection of cost of sidewalks, shall convey a good title to the purchaser; and the balance of the proceeds of sale, after paying the amount due the city and cost of sale, shall be paid by the city to the owner."

Nothing could seem plainer than this. It provides *who* shall pay for sidewalks, and *how* payment shall be enforced. It fixes liability where it was deemed equitable it should begin and rest, upon those immediately and specially benefitted. The requirement that the cost should be defrayed by the owners of the lots, and, if necessary, that the lots should be sold therefor, was ample, effective and prompt for the purpose. It was the wisest provision to guard against 'extravagance and improvidence, and to secure good work, economically performed. Authority of the city to assume a principal and primary liability is excluded, much less to assume to do the work on its own credit, at prices graduated by the par of its fifteen year bonds, and then collecting the same in money in one to five years, with ten per cent. interest, from the lot owners. The first was equivalent or nearly so to cash—paying as we went. This was the authority of the city, the policy of the charter, the law of the case. Considered in the light of an intended benevolence to the owners of lots, to lend them the credit of the city, instead of compelling

payment of cash, it was wholly unauthorized and illegal. (1 Dillon on Mun. Corp., § 393.)

The proceeding was against the plain letter of the charter, against its policy and prudence, a raid upon it by the extravagance and bond-jobbing of the hour.

The charter throughout illustrates this. If the court sitting within the municipality, judicially knowing its territorial extent and plan, and all the features of its jurisdiction, organization and powers, could know also its general character as to population, it would know it to be a city of some 25,000 inhabitants. Its limits extended as far at least as Fifty-sixth street (Title I. Art. 2), but in all this extent only "*two thoroughfares*," and only from Fifteenth to Thirty-fifth streets, East and West, and North and South on Avenues A to D, could be *paved*, otherwise than with *shell*, in any period of five years; and the cost of paving said two thoroughfares was *specially* authorized to be paid for by bonds of the city. (Title IX, Art. 1.)

Including a league and labor (over 4,600 acres) of land.

That is to say, whilst the charter confers general authority to open, grade, shell and repair streets and alleys, it could only pave, otherwise than with shells, two thoroughfares within very

restricted limits, and for these two thoroughfares alone could the city issue bonds. Such is the power of the city as to improvement of its streets.

The limit of the entire taxing power of the city was one per cent. on its taxable property. (Title V., Art. 1, Sec. 1.)

The limit of its power to borrow money for the execution of its general purposes was $50,000. (Title IV., Art. 3, Sec. 2.)

Such is the character of this city charter. Taxation limited to one per cent. The power of borrowing money for general purposes limited to $50,000. The power of issuing bonds limited to the paving of two streets, *i. e.* avenues A, B, C or D for a distance not exceeding twenty blocks, 15th to 35th streets, during any five years. And the power to construct sidewalks limited to the payment of the cost thereof by the owners of lots fronting thereon, to be enforced, if necessary, by sale of the lots. To assert, consistently with these provisions, that, for the construction of sidewalks, anywhere throughout the city, from extreme East to 56th street West, and from Gulf to Bay, there was an implied and unlimited power to issue the negotiable bonds of the city is repugnant to all fair construction.

The power to issue bonds for *street improve-*

ments being thus confined to two thoroughfares, and for other objects not conferred in the charter, and it being desirable to enlarge this power, how was it done? By a resort to implied powers; by claiming that the specific grant to issue bonds to improve two streets did not take away the general power to issue bonds to improve all the others? By claiming the general authority to issue bonds to accomplish the objects of its creation, unless expressly restricted therefrom? There was no such idea contemporary with the charter. On the 2d of December, 1871, the Legislature passed "An Act to authorize the City Council of the city of Galveston to issue and negotiate the bonds of the city of Galveston for the purpose of paying the overdue debt of said city, and to improve the streets of said city by grading, shelling, paving and repairing the same, and building culverts and breakwaters, and to create a fund to pay the interest and principal of said bonds." (Laws 1871, p. 255.)

It was not until a later day that the stimulus of vast contracts and the ambition of great improvements opened the eyes of contractors and Aldermen to the unlimited resources of the little city in its implied power to bind its future population and all their property by the issuance of negotiable bonds to the extent of their pleasure.

Some of the many cases illustrating the principles involved in this case seem proper for citation.

Lucas, Turner & Co. v. San Francisco, 7 Cal., 463. Plaintiff alleged employment by the Street Commissioner to grade certain streets for the city, which was done, and the work accepted by the city, accounts therefor approved by the Common Council, and audited by the Comptroller, who drew his warrants on the City Treasurer. The court say:

From the language of the charter of San Francisco, as well as from its scope and spirit, the Legislature intended to impose all practical checks upon abuses. The corporation by that fundamental law was intended to be limited not only in the *powers* granted, but also in the mode of their exercise. * * If then it be true that the prescribed form must be preserved in order to bind such a municipal corporation as that of San Francisco it would seem to follow as a clear and logical consequence that the doctrine of estoppel for matters *in pais* can not apply to it. Being limited and restricted to certain defined powers, and also to certain prescribed modes, the ends contemplated by the charter could be practically defeated as well by a departure from the mode designated as by the exercise of the prohibited powers. It also follows that when an act could not be done *originally* it cannot in any form be ratified afterwards. * * * While the contract must be in form between the city and the contractor, it is provided by the charter that at least two-thirds of the expense shall be borne by the property adjacent. And by the ordinance 409 it was provided that the expense should be

assessed upon the land fronting on the street, except the crossings, which will be borne by the city. This restrictive provision of the charter must be enforced. The contractor could not look to the city for that portion of the expense designated by the ordinance as a charge upon the land adjacent. * * As a general rule parties who deal with agents of limited powers must take notice at their own peril. * * In the theory of the charter and of the ordinance 409 the improvement of the street was local and for the benefit of the property, and it was not therefore intended to make all the corporators liable to pay for a partial benefit. The charter intended to give the contractor the very best security for his compensation, and for this reason made the property upon the line of the improvement liable, and not the owners personally.

Another objection to these warrants is the fact that they are drawn payable to Wetmore or bearer, and upon their face are negotiable instruments in the same way as a bill or note payable to bearer. The different provisions of the charter when taken together show clearly that the city has no power to issue such paper.

The court show the special instances by the charter in which money could be borrowed and negotiable bonds issued; and say:

"In these specified cases the city could issue negotiable bonds or other evidences of indebtedness, but in no other." * * "If in ordinary cases such paper could be issued either no practical limit could be set to the power of the city to incur indebtedness, or else innocent parties would be liable to loss without the means of redress."

Roeck v. Newark, 33 New Jersey La., R. 129:

"The charter of Newark directed the Common Coun-

cil to make compensation to land owners for damages caused by altering street grades, said damages to be assessed in an appointed manner and imposed on the lands benefited by the improvement. Held, a suit will not lie in favor of a land owner injured by the alteration of a grade against the corporation for the amount of the damages thus sustained, no assessment having been made of the same in the prescribed mode."

The court say:

"It appears clear that if the plaintiff should be permitted to proceed, his success would take from this particular locality the cost of this improvement, and put it in the form of a general tax on the citizens at large. This would be conspicuously violative of the intentions of the Legislature, and would be unjust in itself."

See New Albany v. Sweeney, 13 Ind., 244

Johnson vs. Indianapolis, 16 Ind., 227.

McCullough v. Brooklyn, 23 Wend., 458, was a suit against the city for the value of land appropriated for opening a street. The court say:

The statute does not contemplate that the direct benefits of the improvement will accrue to the whole city, and on that ground, as may be presumed, the burden was not laid upon the corporation. The damages which some will sustain are to be assessed upon other land owners in the immediate vicinity of the road, who are supposed to receive an equivalent benefit from the improvement. * * I am unable to see that any other duty or obligation rests on the corporation than that of putting the necessary machinery in motion according to the requirements of the statute."

It distinguishes other cases in New York, in

which the statute imposed the liability on the corporation.

Lake v. Trustees of Williamsburgh, 4 Denio, 533, is to the same effect, adding that it could not be proved that the trustees had the power to change the burden from the land owners of the particular district to the village at large.

Hunt v. Utica, 18 New York R., 447:

"The Common Council probably were not willing if they could do so to subject the city to the payment of this expense otherwise than by raising the amount by assessment and then handing it over to the contractor; and a contract to this effect would be precisely what the charter contemplates in reference to paying for such improvements."

Swift v. Williamsburg, 24 Barb., 432:

The principal of this assessment law and of every other assessment law of the State for similar local improvements, so far as I recollect, is to charge the expense of the improvement on the property to be benefited thereby. But the result of the rule sought to be established in this action would relieve that property and make the expense a charge on the general funds of the city, to be collected by tax on all the property of the city. * * * The State charged the expense of the opening of North Seventh street on the owner of the adjacent lands. The plaintiff seeks to impose that expense on the tax-payers of the city generally. He is not entitled to the help of this court to effect that object.

And see Baldwin v. Oswego, 1 Abbott N. Y. Decision, 62.

"The grading and paving of Flushing avenue was a public work, the expense of which might rightfully have been raised by general taxation upon all the taxable inhabitants of Brooklyn. The legislature thought proper to shift the burden of the taxation upon that part or class of the taxable inhabitants *exclusively* whose lands were benefited by the work, and to impose it on them in proportion to the benefit they respectively received therefrom. This change in the apportionment of the burthen was obviously made for the purpose of *avoiding the injustice of general taxation for a special local object*, the benefit of which extended only to a portion of the inhabitants of the city. It professed to apportion the tax according to the maxim that "he who receives the advantage ought to sustain the burthen," and to raise from out of the parties assessed no more than his just share of the burthen, according to this equitable rule of apportionment. * * It is wrong that a few should be taxed for the benefit of the whole, and it is equally wrong that the whole should be taxed for the benefit of a few. * * Justice requires that where taxation for any local object benefits only a portion of a city or town, that portion only should bear the burthen. * * *General taxation for such local objects is manifestly unjust. It burthens those who are not benefited, and benefits those who are not burthened.*"—(People vs. Brooklyn, 4 N. Y., 425, 430, 431.)

The practice of municipal taxation by counties, townships, cities, and boroughs for local objects had its origin in necessity and convenience. Hence roads, bridges, culverts, sewers, pavements, school-houses, and like local improvements are best made through the municipal divisions of the state, and paid for by local taxation. These have always been supported as proper exercises of the taxing power. * * This practice was followed by another advance in the local mode of taxation. In cities and towns where the population was dense the authorities began to make improvements of special advantage to certain of the citizens, at their expense, such as footwalks in the front of dwellings and pavements in those streets which were well built up, and where good carriageways were needed. Here, too, though *a step far in advance of the system of general taxation*, our notions of private right were not violated, for the advantages to the many were so clear in the promotion of their convenience and the enhanced value of their lots * * that the burthen was duly compensated. * * (69 Penn. St. R., 358.)

These municipal taxes for the improvement of streets rest, for their final reason, upon the enhancement of private properties.—(McGonegle v. Alleghany City, 44 Penn. St. R.)

Taxes are impositions for purposes of general revenue, assessments are special and local impositions upon property in the immediate vicinity of an improvement, laid with reference to the special benefit which such property derives from the expenditure.—(Palmer v. Strumph, 29 Ind., 329.)

And see Hale v. Kenosha, 29 Wis., 59.
Bridgeport v. N. Y. & N. H. R. Co., 36 Conn., 255.
Alexander v. Baltimore, 5 Gill, 383.

The [illegible] power to pave and keep in repair are expressly granted in the power to levy and collect taxes, and no other measure of exercising the taxing power being granted by the act of incorporation than to levy and collect taxes not exceeding one per centum on all the property of the citizens of said city, none other can be used. Whether another mode might have been more expedient or had been

which the statute imposed the liability on the corporation.

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Ruppert v. Baltimore, 23 Maryland, 193:

If the city be liable to the contractors for the work the effect would be to compel the city first to pay the expenses and then to collect the money by a suit against the petitioners. This, in our opinion, is not the meaning of the ordinance. When it declares that the petitioners shall be responsible it is equivalent to saying that the city shall not be responsible.

Fairfield v. Radcliff, 20 Iowa, 396: Held, where a charter authorized sidewalk improvements to be made, but did not authorize their assessment against the lots fronting thereon, the city could not make such assessment by ordinance. The court say:

That the power can not be implied, because the means provided for the purpose are adequate, and that the exercise of powers by implication is never to be indulged, except when necessary to carry out and make operative that which is expressly granted. One is not included in the other, nor can one be any more exercised than the other without a grant of authority from the Legislature.

Annapolis v. Harwood and wife, 32 Md., 480, is to same effect. The court say:

"The means of carrying into effect the power to pave and keep in repair are expressly granted in the power to levy and collect taxes, and no other measure of exercising the taxing power being granted by the act of incorporation than to levy and collect taxes not exceeding one per centum on all the property of the citizens of said city, none other can be used. Whether another mode might have been more expedient or had been

usually granted to like corporations, was a matter to be considered by the Legislature."

Judge Dillon, in his work on Municipal Corporations, §55, lays it down as

"A general and undisputed proposition of law, that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in *express words;* second, those *necessarily or fairly implied* in, or *incident* to, the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation—not merely convenient, but indispensable Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power so derived."

This language is quoted and affirmed in Texas. (Williams v. Davidson, 43 T., 33–34.

In Head v. Providence Ins. Co. (2 Cranch, 169,) C. J. Marshall says:

"The act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated."

The question is not, whether, if the power of constructing sidewalks had been conferred on the city without restriction, it could have borrowed money or issued negotiable bonds to exercise it, but the manner in which sidewalks should be constructed being specified, being ample for the ob-

ject, "the very best security" therefor (7 Cal., 463), can the city exercise the power in a wholly different manner, less effective for the object, a far inferior security, oppressive to those not the objects or beneficiaries of the power, and by means never implied except from the clearest necessity?

In Annapolis v. Harwood, 32 Md., 480, heretofore cited, the court say,

"A corporation is the creature of the law, and is incapable of exercising any other powers than those conferred by the act of incorporation, or in any other manner than it authorizes."

In Lucas v. San Francisco, 7 Cal., 463, heretofore cited, the language to this point is,

"Being limited and restricted to certain defined powers and also to certain prescribed modes, the ends contemplated by the charter could be practically defeated as well by a departure from the mode designated as by the exercise of the prohibited powers."

Where mode of making improvements is prescribed by statute the mode in such cases constitutes the measure of power. Zottman v. San Francisco, 20 Cal., 102; Nicholson Paving Co. v. Painter, 35 Cal., 705.

Dillon lays down the rule,

"As the authority to levy taxes or to make local as-

sessments does not exist unless unequivocally conferred, so it can be exercised no further than is clearly given; and if the mode in which the authority shall be exercised is prescribed that mode must be pursued."

2 Mun. Corp., §610, and cases cited, note 3.

"§ 653. If the charter gives to a municipal corpo tion a specific and complete remedy for the collection taxes, as by a distress and sale of property this will, dinarily, be regarded as excluding, by implication, right to resort to any other mode of enforcing the tax

* * * * * *

"If the specific remedy is full and adequate such an intention would be more readily deduced."

And see § 654.

"It is a principle universally declared and admitted that municipal corporations can lay no taxes, general or special, upon the inhabitants or their property, unless the power be *plainly and unmistakably conferred.*"

The theory of the charter can not be doubted. It is that the burden of the expense for constructing sidewalks should be placed on the owners of the lots fronting thereon and on the lots appreciated in value thereby. Is it consistent with that, and will the implication be raised, that this burden could be imposed likewise on the body of tax-payers? Is the business of tax-paying such a luxury that it may be implied without necessity; actually, substantially doubled, with a slight variation—the city compelled to pay to the contractors, and the lot owners to pay to the

city? *Cui bono?* The tax-gatherers, speculators in contracts, and speculators in city credits—none else.

But again, the charter fixed the extent of city taxation at what was deemed prudent, alike with reference to the ability of the tax-payers and the necessities of the administration of their municipal affairs—one per cent. on the property of the city. For the paving of streets, the incurring of debt and consequent taxation therefor were restricted within narrow limits. For sidewalks, the cost was to be defrayed by the owners of the front lots. The remainder of the one per cent. was applicable to the other purposes for which taxes could be laid. But if bonds could be issued and taxes imposed without any restriction for sidewalks it is apparent that the city thereby disabled itself for its municipal duties.

If we are to be told that a City Council was entitled to implicit trust in these matters, I answer, No. To what use are city charters, is wise organization, are checks upon power, is the organic apportionment of equitable burdens, if there is implied a legal right of their utter dislocation and revolution, always dependent solely on the good faith and wisdom of the administrators for the ime being of the city government? Scarcely, any question in American affairs is fraught with more abounding or permanent interest.

Third. Title IV of the City Charter, "Of the City Council—its GENERAL Powers and Duties," Art. III., Sec. 2 provides, "That the City Council shall not borrow for general purposes more than $50,000."

If it be admitted that the construction of sidewalks was a purpose for which the city could borrow money, by the City Charter, then it was subject to the above limitation, and this contract for its bonds to mature in fifteen years for hundreds of thousands of dollars was unlawful.

Payments in bonds of the city on time was a borrowing of money. Rogers v. Burlington, 3 Wallace, 666. Middleton v. Alleghany Co., 37 Penn. St., R. 241.

It is claimed on the other side that the city had power to borrow money for sidewalk improvements, and issue its bonds therefor, under the fourth section of the same Article of the charter. We set out sections 2, 3 and 4 as follows:

SECTION 2. That the City Council shall not borrow for general purposes more than $50,000.

SEC. 3. To appropriate money, and to provide for the payment of debts and expenses of the city.

SEC. 4. To provide, by ordinance, special funds for special purposes, and to make the same disbursable only for the purpose for which the fund was created; and any

officer misappropriating said special funds shall be deemed guilty of malfeasance in office, and shall, on complaint of any one interested in said fund so misappropriated, be removed from office, and be incapable thereafter to hold any office in said city; and shall, on conviction, be fined and imprisoned, etc.

Two propositions are assumed by plaintiff.

I. That, although the charter conferred on the city the power to construct sidewalks and to borrow money therefor, it was not one of the "general purposes" of the city government within the purview of the charter.

II. That the construction of sidewalks was a "special purpose," for which the charter authorized "special funds" to be provided, by borrowing *money* and issuing negotiable bonds, without restriction.

I. We have heretofore listened in vain, and do not think there is the ability for any explanation which will make this distinction satisfactory or intelligible.

What are the "general purposes" of the municipal government of the City of Galveston within the scope of its charter? An approximation to the idea entertained by the other side seems to be that cities are chartered in order to pay salaries to city officials; to run a government machinery; to provide what is called city expenses; and that

the judicious interpretation of the city charter was, that everything the city was empowered to do was a "special purpose," for which it could issue bonds, except the furnishing of funds to city officials, and for that they could borrow the ready money.

We deny, utterly, the right to pronounce the construction of sidewalks a "special purpose,' as contradistinguished from a "general purpose," within the rightful purview of the city charter.

It is not probable that a city charter exists in the United States in which authority is not given to provide for the construction of sidewalks, with more or less limitation, generally at the expense of the proprietors of lots fronting thereon; sometimes at the expense of the city alone, and sometimes at joint expense, or at the discretion of the city whether to assume the expense or part of it, or to impose it on the lots. There is no subject which is more universally one of municipal administration; and no purpose which can be specified as more properly, more essentially, one of the general purposes of city government. "It is usual in this country," (says Dillon, section 538,) "for the Legislature to confer upon municipal corporations very extensive powers in respect to streets and public ways within their limits." This

is common experience, and does not require illustration.

"Construction and repair of highways and streets for public travel within their limits (of municipal corporation) are among the *usual purposes of their creation*, and the expenses of accomplishing these objects are among their usual and ordinary burdens. (Rogers v. Burlington, 3 Wal., 663. Mr. Justice Clifford.)

II. The construction of the fourth section by plaintiffs perverts its obvious design. It does not enlarge the power of the city to incur debt, or obtain money, or increase its revenues. It means plainly, that out of the revenues of the city the council shall have the power to provide by ordinance, to designate and set apart "special funds for special purposes," and hold the same sacred for such purpose, rendering its diversion to any other object by any city official criminal. Not that there are "general" or "special" "purposes" of city government. But for any purpose of the city government, deemed of adequate importance, the council has the discretion and power to provide by ordinance that it will set apart a certain percentage, or a certain aggregate amount of its funds, and secure its application to the purpose. It thus becomes a special fund for a special purpose. According to plaintiffs' theory, what are special pur-

poses, or rather what are not so? What demarks the line? What principle of law? What consideration of policy? Is the City Council left to decide for itself? Is a purpose "general" to-day, provided for out of the general funds; and can it be made "special" to-morrow and the city enter the markets of the world to raise money to accomplish it? Had the construction of sidewalks in the city been a mere "general purpose" to which a portion of the general revenues of the city, as deemed expedient, had been applied, or not applied until the 19th day of Aug. 1873, when this *purpose*, this object of city government—the business of constructing sidewalks took on the character (in accordance with the charter) of a "special purpose," limited only by the extravagance of speculative contractors and enthusiastic aldermen?

The clause of the charter relating to sidewalks is section 8 of the same article and title from which we are now quoting, the title being "Of the City Council, its *general* powers and duties."

Throughout this title, not a power or purpose is specified, but could with equal propriety be claimed to be "special," and authorize the indefinite borrowing of money and issuance of negotiable bonds.

Section 1. To remove and prevent all obstruc-

tions in the bay and channel. To improve and preserve the navigation thereof. To erect wharves on property owned by the city.

Sections 2, 3, and 4 have been quoted.

Section 5. To prevent introduction of contagious diseases, and make and enforce quarantine laws.

Section 6. To provide the city with water and establish public wells, cisterns, reservoirs, in and out of the city for extinguishment of fires and convenience of the inhabitants.

Section 7. To have exclusive control and power over the streets, public grounds, etc., with specification of largest powers over same.

Section 8. As to bridges, culverts, sewers, *sidewalks*, etc., as already quoted.

Section 9. To provide for lighting the streets, etc.

Section 10. Establish and erect market houses, etc.

Section 11. Public grounds and cemeteries.

Section 12. Erect and establish one or more hospitals, etc.

And so on, through 53 sections.

Now which of these are the "general purposes" for which the city is limited to borrowing more than $50,000?

And which of them could not with more propriety be claimed to be a "special purpose" for which the only limit on the power of the city was its ability to obtain credit?

To what end then was the limitation on the power of the city to borrow for general purposes more than $50,000?

To what end was the provision in section 8, relieving the city from the cost of sidewalks and enacting how their cost should be defrayed?

To what end was special provision for paving two thoroughfares every five years, issuing bonds in payment thereof, and providing for shelling streets at two-third of the cost of the abutting lots?

To what end was any organic limitation in this charter, if it could be thus nullified by the magical overwhelming operation of the power to provide "special funds for special purposes?"

See 1 Dillon on Mun. Corp. § 85, et. seq. and cases cited.

Fourth. The contract sued on for the construction of sidewalks in the city of Galveston was not the valid contract of the corporation of said city.

I. Because the City Council could not delegate the power to the Mayor and Chairman of the Committee on Streets and Alleys to make the same.

II. *Because the said Mayor, etc., still further delegated the power to determine the paving of said sidewalks to the owners of lots thereon.*

1. The amended petition refers to the ordi-

nances exhibited therewith as "embracing the authority for the making of said contract, and as the averment thereof in specific terms." (Trans., 35.)

These ordinances purported to authorize the Mayor and chairman, etc., to enter into and make a contract or contracts to fill up, grade, and pave, and curb, certain sidewalks, specifying same—the sidewalks to be paved; "either with *asphalt, hard brick* laid on a bed of Portland cement and properly grouted; *concrete* made of Portland cement mixed with other proper material; or with *tiles*, or *stone*, laid in a bed of Portland cement."

The charter vests in the City Council the power to establish and construct sidewalks. This was a legislative power of the Council, requiring the exercise of their judgment and discretion for the interest of the public and their constituents. It was not a valid exercise of this power to authorize the Mayor, etc., to contract for the construction of sidewalks to be paved with asphalt, hard brick, concrete, tiles, or stone.* This embraced the entire range of materials which can possibly be used for sidewalks, except wood, which practically is never used.

No specification of any particular whatever as to thickness, or any other quality, of the pavement. The mere detail of these materials made it

no less a delegation of power over the whole subject than if the detail had been omitted. The duty of the Council was one of great importance, of substance—to be performed in good faith. It would be the veriest trifling to permit the duty to be abdicated by the Council, and transferred to others by the thin disguise presented in this case.

Dillon thus lays down the rule:

Public Powers and Trusts Incapable of Delegation:

The principle is a plain one, that the public powers or trusts devolved by law, or charter, upon the Council or governing body, to be exercised by it when and in such manner as *it* shall judge best, can not be delegated to others. Thus, where by charter or statute, local improvements, to be assessed upon the adjacent property owners are to be constructed in such manner as the Common Council shall prescribe by ordinance, it is not competent for the Council to pass an ordinance delegating or leaving to any officer or committee of the corporation the power to determine the mode, manner, or plan of the improvement. Such an ordinance is void, since powers of this kind must be exercised in strict conformity with the charter or incorporating act."

But he says, "the principle that municipal powers can not be delegated does not prevent a corporation from appointing agents and empowering them to make contracts, nor from appointing committees and investing them with duties of a ministerial or administrative character. (1 Mun. Cor., Sec. 60.)

The cases are referred to by Dillon, Secs. 60, 567, 618, 649, and notes. The language of the

court in a few of them will be cited to illustrate the principle.

In Thompson v. Schermerhorn, 6 N. Y. (2 Seld.) the court say:

The Legislature intended to place the responsibility of determining the mode and manner, or in other words, the plan of the improvement upon the Common Council. The trust is an important and delicate one as the expenses of the improvement are, by the statute, to be paid by the owners of the property in front of which it is made. In effect it is a power of taxation which is the exercise of sovereign authority, and nothing short of the most positive and explicit language can justify the court in holding that the Legislature intended to confer such a power on a city officer of committee.

Hyde v. Joyes, 4 Bush, Ky. R., 468:

The property owners are not only interested in the improvements but also in the kind and character thereof, including the grade and materials and width of pavement, etc.; therefore they have the legal right to have these things passed on by the City Legislature, the members of which are responsible to their constituency for all measures of oppression or neglect.

Pavement signifies to floor with stone, brick or other hard substance, involving great difference of price, as well as durability, and requiring the exercise of sound judgment to determine the economy of the one rather than the other, as the lowest in price might be the dearest to the owner, because of its want of durability. So one grade might be proper and economical while another would be injurious and wasteful. The determination of all these matters has wisely been confided by the Legislature to the City Council, and not to the engineer. We

perceive no reason why it is not quite as convenient to ascertain these facts before as after the ordinance, but were it not so, the law, and prudence and safety to the property owner, requires that it should be so. It is the exercise of a vast power over the rights and property of the citizens, and whilst necessary to the growth and convenience and commerce of the population of a large city and the public generally, yet such power should be exercised as the law directs, and strictly confined within legal limits.

And see Mayor of Baltimore v. Porter, 18 Md., 300; Oakland v. Carpentier, 13 Cal., 244; Ruggles v. Collier, 43 Mo., 359; St. Louis v. Clemens, 43 Mo., 359; East St. Louis v. Wehring, 50 Ill., 28; Day v. Green, 4 Cushing, 438; Coffee v. Nantucket, 5 Cushing, 272; Ruggles v. Nantucket, 11 Cushing, 436; Exparte Winsor, 3 Story, 411. Scofield v Lansing. 17 Mich 437.

The cases cited by Dillon, of Delegation of authority to make contracts and to exercise ministerial powers, are Hannibal & St. Jo. R. v. Marion Co., 36 Mo., 304, in which it was held that:

"An Act of the Legislature investing the County Court with power to do certain acts necessarily implies the right to use the fit and appropriate means. Where, by an order of record, the County Court ordered that a subscription be made for the stock of a railroad in accordance with an authority conferred by the charter of the company, a subsequent order of the court appointing an agent to enter the subscription upon the books of the company was a proper method for completing the subscription; the agent was a mere instrument executing an order:

And Schenley v. Alleghany, 36 Penn., St. R. 62, in which, in answer to a point that it was not competent for the council to sub-delegate their power of taxation to the Street Commissioners, the court say:

> It was the act of Assembly, not the ordinance, which charged the burden on the lots; and it was the act of Assembly that directed the Street Commissioner to make out the assessment. It was not therefore required that the ordinance should assess any definite tax or any tax, and there was no delegation by the councils of their power of taxation.

The distinction between the authority vested by the Charter in the City Council, depending on its judgment and discretion, to effect important interests of its constituents and the public, which it alone could exercise, and the ministerial and executive acts, through agents, to carry this authority into ultimate effect, as involved in this case, is too broad to admit of confusion. The character of sidewalks, to be established and constructed in the City of Galveston, was entrusted to the City Council. When determined, it could employ agents to carry out that determination. But it was no performance of the duty to devolve on a committee the selection of sidewalks to be composed of any one of all the materials known to the construction of sidewalks, without a single direction as to the manner of construction. The

power which can be conferred on agents to make contracts is the power to perform the ministerial duty, after the preliminary judgment and discretion have been employed to direct what contract shall be made. Under the form of an agency to *contract* for sidewalks, the substantial power and duty of determining all the elements of the subject matter about which a contract was to be made, could not be delegated.

II. The City Council delegated the power to contract for sidewalks to the Mayor and Chairman of the Committee on Streets and Alleys. They made a contract by which the power was delegated to the owners of lots on each sidewalk to determine whether paving should be done, and to determine the material. This was clearly incompetent. The point will be more fully considered hereafter.

Fifth. Two questions are presented upon the contract sued on, and plaintiffs' cause of action thereon.

1st. Is it a contract by which the right was

attempted to be conferred on the plaintiffs, to do curbing and filling on the sidewalks in Galveston, to the amount of hundreds of thousands of dollars, payable in the negotiable bonds of the city, separately and independently from the paving of the sidewalks, leaving the paving conditional, indefinite and undetermined?

This is understood to be the plaintiffs' view of their case. If so, we maintain,

(*a*) That the City Council had no power to make such contract.

(*b*) That the Council conferred no power to make such contract on the Mayor and Chairman of the Committee on Streets and Alleys.

(*a*) The authority of the charter is to establish and construct sidewalks. Paving was essential to this. Without the pavement, the sidewalk was incomplete. The ordinances required contracts for sidewalks, including paving as part thereof. The argument is, however, that the city could contract for the filling and curbing, leaving the paving to be done subsequently. But there was no contract to do the paving at all, to do it at any time. It is not a question of the means and manner of doing an entire thing, in parts or stages. But, where the power of a municipal corporation is to do an en-

tire thing, can they incur vast expense, contract irrevocable debt in doing certain parts of it, in themselves of no benefit but of great injury, making no provision for the entire work, leaving that conditional and uncertain? The power was specific, single, entire. Until the Council determined on the establishment of a sidewalk, it had no jurisdiction to expend money for sand or lumber, leaving the question of the sidewalk wholly unsolved. Suppose the City Council in 1874 had entered into a contract for $300,000 worth of asphalt from Neufchatel, or of stones from Belgium, or bricks from Philadelphia, or any other article that may enter into the construction of sidewalks. Would such contract be valid? Could it be said that it was a very prudential purchase, which the Council of 1875 or of 1876 *might* render available for the construction of sidewalks? The divisibility of the power, attributing to the Council absolute discretion in the manner of its exercise, would lead to the most absurd results. How long before the paving must have been added? Could embankments of sand have been put before peoples doors for one month, for one year, or for ten years? If there was power to do this by the city, and to bind the city to pay for it, where was the power to compel the city to do any more? What remedy had the public to obtain sidewalks?

By the charter it is the sidewalk "constructed" which the city could make assessments to pay for. By the ordinance, when a sidewalk was "finished and completed," the assessment was to be made, (section 5, p. 37.) It was the proper *pro rata* cost of "filling, raising, curbing *and* paving" that the lot owner could be made to pay for. Now, the strength of the argument for the power to tax and to borrow money by the city, is, that the city was to be repaid by the local assessments. But no authority, whatever, existed to make such assessments except *for sidewalks*. And the argument leads to the assertion of a power to borrow hundreds of thousands of dollars for any material or work relating to sidewalks; yet no sidewalk ever be constructed, or its construction determined in any legal manner, and no power of assessment on the owners of lots for one cent. Legalize this, and the City of Galveston is a trading corporation of boundless powers. Look over its powers, and there is scarcely any commercial material but might relate to it more or less directly.

(*b.*) The power conferred by the ordinances on the Mayor and Chairman, etc., was to make contract or contracts to fill up, grade and pave certain sidewalks, and to curb the same (p. 36, § 5). It was for the sidewalk, "finished and completed," that assessments could be made. The power

thus conferred was entire. It was not to do a part and leave the remainder undone. This is so, not only by the force of the terms employed, but from the nature of the subject matter. Judge Woods in his opinion in the court below illustrates this forcibly.

"The authority given to the city by its charter was to construct sidewalks; * * * the filling, grading and curbing were only the preparatory steps necessary to the completion of a sidewalk, by the putting down of the pavement. The main purpose and ultimate object were the pavements. No sane man supposes for a moment that the City Council desired to raise a bank of sand in front of the lots of the citizens and leave it so, or that such was the purpose of the ordinance or the contract. If the City Council had not decided to complete the sidewalks by paving them, they would not have entered upon the work at all." (2 Woods, R. 278).

The power of the committee being to contract for grading, filling, curbing and paving, and thus constructing sidewalks, if the committee contracted for the grading, filling and curbing, leaving the paving conditional on the consent of the lot owners, it was a violation of the power, and their act did not bind the city.

The principle of law is familiar. Story lays it down:

"If an agent is authorized to do an act upon condition and he does it absolutely, or to do an act absolutely, and he executes it upon condition, in such cases the act will

not bind the principal." (Story's Agency, § 165. See also §§ 171, 176.)

II. If, however, the true construction of the contract be, as I do not doubt it is, that the contract with plaintiffs, and the other contracts with respect to paving, as alleged, were, in accordance with the charter and with the ordinances, *entire*, for the completed sidewalk, but conditioned upon the consent in writing, of the lot owners to, and their selection of a pavement, without which no rights were acquiredby plaintiffs, then plaintiffs show no cause of action for the want of averment of such written consent. Nothing can be added to the clearness and force of the opinion of the Circuit Judge in the court below on this point. (2 Woods, R. 272.)

The opinion was prepared upon the allegations in the original and first amended petition. After its delivery and the ruling of the court, the plaintiffs amended again by alleging:

That at the time said contract was made with them, various contracts were made and executed by defendant with other parties for the paving of the sidewalks named in said petition, with the various materials respectively therein named, *conditioned each upon the choice and selection of the respective pavements therein named, just as is nominated in said contract as applicable to said*

asphalt pavement; and had not said contract been abrogated as alleged, each and every of said sidewalks would have been completed according to one or the other of the several modes of pavement adopted by the defendant. (p. 53.)

The last part of this allegation, involving as it does a mere conjecture of a fact, the truth of which it was impossible for plaintiffs to know, passes for nothing. It is apparent that *all* the contracts for paving are dependent on the precedent condition that the lot owners would consent to the paving, and make a selection of the material to be used. The rationale of this it is impossible to mistake. The Council, by permitting sidewalks of any of the various materials of which they have ever been composed, in fact, selected none, and the Mayor and Chairman left the selection to the lot owners. But beyond this, as the entire responsibility had been thrown on the committee, it determined to throw it on the lot owners. They were the parties to pay for them, and they should say whether they would have pavements, and if so, the material of which they should be made. No doubt the purpose was, to afford inducements to them to assume the responsibility. It was a vast undertaking for a town like Galveston. More than half a million of dollars to be expended in sidewalks. The various contractors could go to the

proprietors of lots on each sidewalk, and on procuring from them their written consent, and selection of the material for paving, then the work on that sidewalk could be undertaken, and as soon as it was completed assessments could be made for the cost. But these plaintiffs, without the consent of the owners to the paving of a single sidewalk, at once commenced erecting embankments of sand in front of the business houses and residences throughout the entire region. No wonder, as the petition shows, that the people rose *en masse*, and went with their indignant protests to the Common Council.

The rights secured to the property owners and tax-payers, under this contract, was their "WRITTEN CONSENT" to the pavement for which they were to pay. This was a substantial, invaluable right.

The officials of the city were drawn by the various influences of the times into a vast enterprise for such a community. It gave them pause. They were not willing to take the responsibility without the "written consent" of the parties most vitally interested. I do not doubt that they sought to obtain that consent by the manner in which the subject was presented to them—the decision of the lot owners in favor of *any* sidewalk expected, to operate on others, and the known influence of contractors. But was the

decision intended to be presented to them under the coercion of embankments of sand, or barricades of curbing, placed in front of their premises—for which a burden of debt and taxation was irrevocably fastened upon the city? Was this the consent intended to be secured by this contract? No professional ingenuity is equal to the task of making it credible to the judicial mind.

Sixth. The contract sued on was in excess of the powers conferred upon the Mayor and Chairman of the Committee on Streets and Alleys, and was therefore void.

The plaintiffs set out the ordinances as the authority for the making of said contract. "And they also show to the court the authority under which the bonds named in said contract were issued by exhibiting herewith the ordinance authorizing said issuance as adopted, approved, printed and published by defendant, and set forth in the sixth plea of its said answer, entitled: "An ordinance authorizing the issuance and sale of two hundred and fifty thousand dollars of bonds for the purpose of improving sidewalks by filling, raising, paving and curbing the same." (Trans. p. 35.)

The case, then is, that the Mayor and Chairman,

&c., were authorized to contract for certain sidewalk improvements, and the fund provided by the ordinance for the purpose, (see ordinance, pp. 40, 41) which they were authorized to use, and which alone they undertook to use, was a certain specific issue of bonds of the city amounting to $250,000, to be styled, as provided in the ordinance, "Galveston City Bonds for Sidewalk Improvements," Sec. 1.

The contract is to pay plaintiffs for *paving* in the bonds of the City of Galveston, "styled Galveston City Bonds for Sidewalk Improvements," and all the other work contracted for was to be paid for in the same bonds.

Plaintiffs allege that they did work amounting to $18,193.63.

That on their contract for filling at $1.25 per cubic yard their profits would have been 65 cents per cubic yard, amounting to $50,676.91, so that the amount to have been paid them in bonds for filling was $116,683.36; edging at 9 cents per lineal foot and profit thereon 6 cents per foot, $15,366.48, total cost of edging, $23,049.72; curbing, 45 cents per square foot, profit thereon 31.64 per square foot, $51,941.18, cost of curbing, $73,841.75, making the cost of this part of the work to be paid for in "bonds styled Galveston City Bonds for Sidewalk improvements," $231,771.46. The petition and the exhibits to it afford the data to

calculate precisely the cost of the paving if the sidewalks had been paved by plaintiffs. I have not made the calculation, but the paving alone would exceed $400,000.00. So that, upon the authority of the committee to expend $250,000 in grading, filling, curbing and paving sidewalks, they contracted for improvements for over $600,000, and all to be paid in the bonds styled "Galveston City Bonds for Sidewalk Improvements."

Plaintiffs were bound to know the authority and the extent and limits thereof under which the committee acted.

1 Dillon on Mun. Corp., Sec. 372, citing the cases.

Here they were known, and are alleged to confer the power to make the contract. It is obvious that the fund appropriated to the use of the committee limited their power to contract; and that if they could be held to possess any power to contract outside of the bonds, they did not attempt to execute it, but their contract was specific for the identical bonds, the total issue of which was therefore a limit of their power. The contractors, with full notice that their authority did not extend beyond $250,000, and that this amount was to effect the paving, as well as the filling and curbing of the sidewalks, made contracts with them

by which almost the entire amount would be absorbed in filling and curbing, wholy disabling them from completing the paving.

There can be no pretense that the committee had any power to bind the city for the issuance of other bonds than the $250,000 provided by the ordinance. Nothing can be indicated in the slightest degree tending to show such power. The authority of the committee, as has been shown, must be construed to be entire, and so with its exercise. Neither is divisible, consistently with the charter, the ordinances or the contract.

That such contract did not bind the city and was void is in accordance with elementary principles of law. Story's Agency, Secs. 171, 175, 176.

Seventh. *The allegations of ratification of the contract with plaintiffs do not confer any cause of action.*

I. Because the contract being beyond the powers of the city, could obtain no validity by any acts of ratification.

This is too well settled to require argument. 1 Dillon, Sec. 385, and numerous authorities cited.

See especially Marsh v. Fulton Co., 10 Wal., 684; Zottman v. San Francisco, 20 Cal., 96; Hydes v. Joyes, 4 Bush, 464; Maryland v. Baltimore, 29 Maryland, 85; Argenti v. San Francisco, 16 Cal., Opinion of Justice Field, subsequently adopted by the court.

Mayor Ball v. Reynolds 20 Md. 1.
Toledo Case 20 Wal. 655.

II. The ordinance being invalid the contract made under it could not be ratified, but a valid ordinance, or other legislative act of the Council was essential therefor. (Same authorities.)

III. No alleged acts of ratification constitute any contract with plaintiffs binding the city, even though it be admitted that the city possessed the power to have contracted to issue its bonds for the construction of sidewalks.

The acts of ratification are alleged on page 35 of the printed Transcript. They are, in substance, that a committee made a report to the Council on 28th of March, 1874, that said contract had been improvidently entered into in some particulars, and recommend that work proceed substantially

under its terms, and report an ordinance to that effect, amending the first and second sections of Ordinance 37, and leaving unchanged the third section, wherein is contained the authorization of the Mayor, etc., to contract; that a minority report by one member of the committee was made declaring the contract null and void, and *ultra vires;* that the majority report was adopted by the Council, and the ordinance reported therewith read the first time; and that under the 27th Standing Rule of the Council the adoption of a report is equivalent to an endorsement of its contents, and therefore said contract was thereby confirmed.

It will be observed that one of the grounds of demurrer was, that the alleged acts of ratification were not shown, and were vague, uncertain, indefinite and insufficient. And it is under this demurrer that the allegations are to be tested. Neither the "report," nor the "ordinance" recommended by the report, is set out. But it is clear that the very object of the report and ordinance was to change the contract, to correct alleged improvidences, and to amend the sections of the ordinance which formed the substance of the contract with plaintiffs. To what extent these changes proceeded is not alleged. But it is a contradiction in terms to claim as a ratification of a

contract an act proposing a new contract. But suppose, not only a majority of the committee but the entire committee had reported and the Council had unanimously confirmed it, that the contract made with the plaintiffs was a valid and binding contract. This would not have rendered it so. This would have been a mere repetition of a former error. This is not the ratification which is requisite by municipal bodies in order to bind the public, of which they are agents and trustees. The charter confides to the Council the public trust of exercising its judgment, discretion and responsibility, in deciding all the matters involved in the establishment and construction of sidewalks for the city of Galvston. That function, they can not delegate, or abdicate, in favor of others. If they pass the most solemn ordinance entrusting the duty to a committee of their officials, it is illegal and void. If they pass twenty more ordinances declaring the first valid, declaring the power to have been duly delegated, this will not make it so. Nothing will bind the public, except such acts as will amount to the exercise of that judgment and discretion entrusted to them by law, and, in its very nature and essence, non-delegable. If the delegation results in acts which the corporation could originally have performed, and the corporation afterwards, in effect, says or does

acts from which a court can reasonably and honestly infer that the corporation approves them, in the sense that they were, in themselves, judicious and discreet—that, with knowledge of the right to do otherwise, it chooses what has been done—this is a ratification. But when the only effect to be attributed to the act of the Council is merely to recognize their own impotence to discharge their duty, and simply to reiterate their act of delegation, this is not a ratification.

The further allegation that early in April, 1874, the Council appointed three Aldermen to confer with a meeting of citizens in consultation about the contract, and that the three Aldermen told the citizens it was a binding contract, and therefore it was binding, is scarcely serious.

But suppose it is admitted that the Council did ratify, as a Council, the contract sued on, the vice that it involved no proper exercise of the authority of the Council to establish and construct sidewalks, but delegated this duty to others still inhered in the contract. What was the contract? The ordinance authorized the committee to contract for sidewalks of asphalt, hard brick, concrete, tile or stone. The contract with the plain-

tiffs was that they should construct the sidewalks of asphalt, provided they first obtained the written consent of the owners of the property fronting on said sidewalks to the same. The averment of plaintiffs is, that various other contracts were made by the city with other parties for paving sidewalks with the various materials, with thes ame conditions of agreement or selection by the front owners. So that, instead of the officials selected by the Council exercising the power delegated to them by the Council, they make a contract by which they delegate it still further, namely: to the owners of lots fronting on the sidewalks. How then were sidewalks to be established and constructed in Galveston? Not by any intelligent enlightened exercise of judgment upon the subject by the City Legislature, nor by the officials selected by the Council, but by a canvass of an indefinite number of contractors among the owners of lots—men, women or children, as the case might be—for permission to lay down pavements of asphalt, hard brick of various kinds, concrete still more various, *tiles!* or *stones!*

Eighth. It results from the want of authority to bind the city by the contract sued on, that there is no liability for the filling and curbing which plaintiffs allege they performed.

The plaintiffs made an unauthorized, illegal contract with certain city officers, that, according to their own allegations gave them a margin of profit, of itself, stamping the contract if not with absolute fraud, certainly with gross unconscientiousness—65c. out of $1.25 for each cubic yard of filling—over 31c. out of 45c. for each square foot, and 6c. out of 9c. for each lineal foot of curbing. They took the chances of such an adventure. No court will aid them, or impose a liability on the city, (meaning thereby the taxpayers of Galveston) beyond the function of the corporate government, much less of the Mayor and Chairman of the Committee on Streets and Alleys, ever to create.

Plaintiffs aver acceptance, use, etc., by the city of the work done. The first requisite of pleading is that it must be sensible, rational, credible, in its own nature. How can barricades of curbing, and embankments of sand, here and there, in front of people's premises, be accepted by the corporation of Galveston, be used by it, of value to it, or raise obligation of payment?

The cases cited on "Ratification" involve the same principle. And see 1 Dillon on Mun. Corp., Sec. 381 to 386 and notes; Secs. 749, 750 and notes.

It is to be observed also that the ordinance No. 21 provided for "curbing" on Avenues B, C, D and E. from 18th to 25th streets, and on the intervening cross streets, to be of "pressed brick laid in Portland cement." (Trans. 37). This was amended by ordinance No. 26, and the curbing was to be of "the best hard brick, laid in Portland cement, and capped with a plank of heart pine." Ordinance No. 37 provided for further sidewalks *on the same avenues east of* 18*th to* 12*th, and west from* 25*th to* 33*d*, and on other avenues, curbed with cypress wood, stone or brick. But the contract sued upon by plaintiffs was for "curbing" the entire territory of sidewalks with "three inch red cypress"—and "one by six inch flooring"—(which was pine flooring). So that the contract sued on shows all the vices of dereliction of duty by the Council in delegating to the committee the choice of a portion of curbing "of cypress wood, stone *or* brick," and the disregard of their powers as to all the curbing, the style of which was specified by the Council.

W. P. BALLINGER,
Of Counsel for Defendant in Error.

After seeing plaintiff's brief, some comments on the cases cited by him to sustain the general power of issuing negotiable bonds are added.

Com. v. Pittsburg, 41 Penn. St. R., 279, was a case of legislative authority to subscribe to stock of a railroad company "*as fully as an individual.*" Held, to involve the necessity of creating debt and evidencing it by bonds. But this case does not assert any implied or inherent power in municipal corporations to borrow money and give negotiable securities for any and all the objects within the range of their duties.

Bridgeport v. Railroad Co., 15 Conn., 475, was a subscription to a railroad, and the bonds expressly authorized therefor by the legislature.

In Ketcham v. Buffalo, 14 N. Y., 364, it was held that the charter gave the power to purchase the site for a market, and that it was competent to purchase on credit and give bonds of the city in payment.

Whilst the court in this case sustained the power, Selden, J., says: "It was undoubtedly supposed," (by the legislature) "whether rightfully or not, that the power to borrow money could not be exercised without legislative authority."—(P. 362.) And he entirely disclaims the general power to borrow money for the authorized purposes of the city.—(365, '6.) He says: "To concede to corporations the power to borrow money for any purpose would be entirely subversive of the principle which would limit their operations to legitimate objects."—(366.) And he says, referring to statutes of the state claimed to confer this general power: "*This important question, however, is yet to be judicially settled.*"—(367.)

The Chilicothe Case, 7 Ohio, 354, decided in 1836, involved the liability of the city for a small amount of money borrowed for the use of the city.

The court say: "It is a case of the *first impression*," (358,) and they hold that whilst, as to natural persons, inability to contract constituted a defence, "a different rule should prevail where a corporation sets up by way of defence that it had been guilty of usurpation of power," and that "no case could be found in which inability to contract by a corporation had been set up to avoid payment of a debt."—(358, '9.)

A case founded on such a view of the effect of the "usurpation of power" by municipal corporations can scarcely be looked to for a safe guide as to the legal measure of the power of such corporations.

Douglas v. Mayor, &c., 5 Nevada, 147, upon promissory notes of the city for the rent of rooms for the meetings of the city council, is based on the case of Ketcham v. Buffalo, 14 N. Y., above noticed.

The light in which the case now before the court would be regarded in that state may be gathered from the case of State v. Rosenstock, 10 Nevada, 146, where a city charter required improvements of sidewalks to be assessed against the property, and the argument was made that there was

no restriction in the charter on the city to loan its credit, the court say no such restriction was required because no such power was granted.—(P. 147.)

Plaintiffs refer to Mills v. Gleason, 11 Wisconsin, 470. Most latitudinous doctrine seems to have originally prevailed in that state as to the power of municipal corporations. In Bushnell v. Beloit, 10 Wisconsin, 228, '9, it was held that, independently of any legislative grant, they had power "*to borrow money and loan their credit to enable them to engage in such public improvements as are deemed necessary to develop the resources of the tributary country and increase the business, commerce, and traffic of the respective localities.*"

Subsequent decisions have entirely repudiated such doctrines, and brought the construction of municipal corporate powers to the limits of the well-considered cases.

See Foster v. Kenosha, 12 Wis., 616.
Broadhead v. Milwaukee, 19 Wis., 624.
Whitty v. Supervisors, 25 Wis., 664.
State v. Tappan, 29 Wis., 664.

Plaintiffs refer to Cummings v. Mayor, 11 Paige, 596. The principle in that case is thus stated by the court (p. 602): "The fair construction of the contract is that the complainants shall be paid for their labor when the assessment shall be made and collected, without any unreasonable delay after the work is done. *And as the defendants had violated their contract by not having a proper assessment made without unreasonable delay*, I think the complainants were entitled to a general decree against the corporation for the payment of the amount due with interest and costs. The defendants, therefore, had no right to complain that the decree gave them a further time to *collect the money by a new or amended assessment, instead of directing the corporation to pay immediately.*"

Very strangely, the plaintiff's counsel also refers to Baldwin v. City of Oswego, 1 Abbott's N. Y. Court of Appeals Decisions, 62; and as this case was cited by the circuit judge in the court below, and I think puts the principle in a very clear light, and wholly inconsistent with the contract sued on, I will copy a citation from the opinion of C. J. Denio (p. 66):

"The opinion of the referee was, that the common council possesses the general power to make improvements of this character, including the authority to contract with individuals for their construction; and that the contractors or other persons employed are not concerned to inquire how the money to enable the council to pay the compensation is to be obtained; that the local assessments are only a method of taxation, and that the defendant can no more deny its primary and general liability than it could if the contract were for work falling within the description of expenditures chargeable upon the city generally, the means for repaying which are provided for by the general tax or other sources of general income. Without examining the argument in detail, I am of opinion that there is a clear distinction between the cases. *It is assumed by the provi-*

sions of the charter, that there is a class of improvements so essentially local in kind that the general taxpayers ought not to be burdened at all with the cost of their construction; and hence a system is provided for reaching directly the parties chargeable with them, without calling upon taxpayers for any part of the expense. A judgment against the city as a corporation would be a charge upon its general resources; and if the council have the power of contracting in the manner supposed by the argument, the city can be made liable to *burdens which the law designed should be borne exclusively by only a part, and it may be in a given case a small part of the citizens.* I am, therefore, of opinion that the action cannot be sustained on that theory."

On the ground of the duty of the city in failing and refusing to continue the assessments, part of which had been made and paid to the plaintiff, and of the violation of its contract therefor, the court sustained a recovery.

See also the subject of
McKelvain v Schraubstadter
37 Am. St. Rep. 191

1 Power to make the
wheel
2 [illegible]
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3 [illegible]
Chamber [illegible]
4 - [illegible]

IN THE

Supreme Court of the United States.

No. 153.—October Term, 1877.

DEXTER G. HITCHCOCK and JAS. W. BYRNES,
Plaintiffs in Error,

vs.

THE CITY OF GALVESTON, Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

For Defendant in Error,

By GEORGE FLOURNOY.

Joseph L. Pearson, Printer, 9th and D streets, Washington.

IN THE

Supreme Court of the United States.

No. 153. October Term, 1877.

Dexter G. Hitchcock and James W. Byrnes, Plaintiffs in Error,
vs.
The City of Galveston, Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

The following brief is respectfully submitted in behalf of defendants in error in the above-entitled cause:

This case was tried at the December term, 1874, in the Circuit Court of the United States for the Eastern District of Texas.

The demurrer of defendant in error to plaintiffs' petition was sustained, and for alleged error in this the case has been brought here.

The legislature of Texas, in 1871, granted a new charter to the city of Galveston. Art. 30, sec. 1, of said charter provides that the same shall be deemed a public law.

Sec. 8 of the charter grants to the city of Galveston the power, through the city council, "to establish, erect, construct, regulate, and keep in repair * * * sidewalks, etc., and to regulate the construction and use of the same; * * * and the cost of the construction of sidewalks shall be defrayed by the owners of the lot, or part of lot or block, fronting on the sidewalk," etc.

In the supposed exercise of the power thus conferred it is claimed the defendant in error entered into the pretended contract with plaintiffs — damages for the breach of which was the demand set up in the circuit court.

The contract exhibited in the original petition will be found on pages 5, 6, and 7 of printed record.

The case was heard before the Hon. W. B. Woods, circuit judge, who sustained defendant's demurrer to plaintiffs' petition, and, plaintiffs declining to further amend, rendered judgment for defendant.

The opinion delivered at the time (and to which reference is made) based the judgment upon two grounds:

1st. "That plaintiffs have not, by their pleadings, shown a good cause of action, for want of an averment that they had performed the condition precedent, which was necessary to be averred, in order to show a contract which, even if authorized, was binding upon the city."

2d. "That neither the city of Galveston, nor any committee of its appointment, had authority to make the contract sued on. It is, therefore, absolutely null and void."

The first suggestion has relation to that feature of the contract requiring plaintiffs in error to obtain the written consent of the owners of abutting property to the laying down of an asphalt pavement, and the absence of an allegation that such consent had been obtained.

The second discusses at large and unfavorably the attempted exercise of power by the city council to make a contract contemplating the issuance of bonds of the city in payment for sidewalk improvements.

The precise statement of the points are more clearly made in the opinion of Judge Woods than I can hope to make them, and the reasoning upon principle and authority so satisfactory that I am constrained to let the argument for the defendant rest (as to those matters) upon the opinion referred to.

It is, however, respectfully submitted that there are other questions apparent upon the record entirely worthy of consideration.

I shall discuss only those points made by special demurrer to the petition.

Printed record, pages 10, 11, 12.

Summary.

1st. The plaintiff alleges that the contract was entered into on behalf of the city by the mayor and chairman of the committee on streets and alleys, and that the authority of these officers to act in behalf of the city of Galveston in the premises is derivable from three ordinances of said city, approved respectively, 19th of August and 21st of October, 1873, and 3d of February, 1874. These ordinances appear in the printed record, pages 13 to 17 inclusive.

A brief comparison of the contract with these ordinances will, we think, clearly illustrate that the contract, for breach of which this action was brought, is in some essential particulars, not only unauthorized by the ordinances, but contrary to the purposes of the city council expressed in them.

Assuming the ordinances to be valid, the departure of the committee, in making the contract, from the expressed purpose of the council, as set out in the ordinances, it would seem, was clearly unauthorized, and the contract must fall. The particulars of variance are essential and necessary parts of the contract.

The first ordinance requires that the curbing for sidewalks shall be made of the "best pressed brick, laid in Portland 'cement;'" and this covers in locality and extent about one-half of the entire work contemplated by all the ordinances.

The ordinance amendatory of this, approved October 21st, 1873, provides that the curbing of such sidewalks "shall be made of the best hard brick, laid in Portland 'cement, and capped with a plank of heart pine three 'inches in thickness and 12 inches wide, properly fastened 'to the curbing with necessary iron bolts."

The contract provides for wooden curbing for all the sidewalks named in *all* the ordinances. This is a provision in the contract contrary to the requirements of the above ordinances. The ordinances provide only that sidewalks shall be constructed "on the west side of 18th" "and the

east side of 25th streets, between Strand and Post Office streets," while the contract is for the construction of sidewalks on the entire length of 18th and 25th streets.

It is therefore plain that, in essential particulars, the contract is not only unauthorized by the city council, but contrary to their declared purpose.

2d. It is said, however, in the argument—but not by proper averment in the petition—that the *contract had been ratified by the council.* It is not disputed but that if the council could have lawfully authorized the committee to make the contract in the first instance, a departure from the terms suggested in the grant of power to the committee could have been cured by subsequent ratification. This seems to be the view of the authorities upon this precise point. Still, since municipal bodies are parliamentary in all their forms of action—since a law—an ordinance—by this legislative body was certainly necessary to confer the power upon a committee in the first instance, it would seem to be settled upon principle and authority that (if the contract as set up be relied upon) the ratification or confirmation of such contract must, to be adequate and binding upon the city, have been done in the usual form of action by legislative bodies. The doctrine of liability as upon implied contracts has no application to cases of this character.

In Argenti vs. San Francisco, (16 of California,) the then Chief Justice Field, delivering the opinion upon a rehearing, responds to the suggestion of implied obligation on the part of the city, as follows:

"A municipal corporation can only act in the cases and in the mode prescribed by its charter for street improvements of a local nature. *Express contracts*, authorized by ordinance, are necessary to create a liability. The doctrine of liability as upon implied contracts has no application to cases of this character. That doctrine applies to cases where money or other property of a party is received under such circumstances that general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same."

And again: "The improvements for which the claim is brought in the present case were local in their character, and though, to some extent, of general benefit, yet were chiefly for the benefit and advantage of the immediate neighborhood.

"It is for this reason that assessments for such improvements are generally levied upon adjacent property. . The advantage resulting from them do not constitute that kind of general advantage to the city, from the existence of which any liability to pay for the same can be inferred.

"The general rule, that when one takes a benefit which is the result of another's labor, he is bound to pay for the same, does not apply to cases of this kind. The benefit is immediately to the adjacent property-holders and only indirectly to the city at large."

These doctrines are re-affirmed in Zoltman vs. San Francisco, (20 Cal., 96 108.) and the same judge states, in the conclusion of the opinion (page 108), referring to the previous opinion in Argenti vs. San Francisco, as deciding—

"That a municipal corporation could only act in the cases and in the mode prescribed by its charter, and that for street improvements of a local nature express *contracts*, authorized by ordinance, were necessary to create a liability, and that the doctrine of liability as upon implied contracts had no application to cases of that character."

It is observable that Mr. Justice Cope, in concurring in the last opinion, expressly yields the views previously expressed in the opinion delivered by him in the case of Argenti vs. San Francisco.

Printed record (page 10) exhibits the fourth exception set out by way of demurrer, and reaches the defective allegation of ratification.

It is to be observed that this is no averment of ratification.

It should, to be an averment, set out this ratification as a substantive fact by way of averment.

"It must be a positive statement in opposition to argument or inference."

1st Perkins' Chitty's Pleadings, page 329.

In the matter under consideration, however, the mode and time of the alleged ratification should be alleged, so that the defendant and the court may be notified if there has in fact been lawful ratification.

It is, however, apparent from the petition that even though the allegation be sufficient in form, there was in fact nothing done by the council that can be called a ratification of the contract.

It is not pretended that there was any deliberate legislative action in the premises as to the merits of the contract after it had been signed.

The only question subsequently raised in the council, as set forth in the petition, was as to the legal effect and binding force of the contract; and it would seem that if the adoption of the report of a committee appointed to ascertain the condition, be sufficient deliberative action by the council, under its forms for transacting business, the only thing settled by such action was that the council believed, or a majority did, that the contract was binding, and *not* that it was a proper contract, or that they approved its terms. The clear inference is utterly to the contrary. The very motive of inquiry as to its validity indicates beyond cavil that they did not purpose to ratify but only to adhere to in case they could not avoid it.

3d. However, we do not believe the city council could lawfully have entrusted the committee (consisting of the mayor and chairman of the committee on streets and alleys) with the grave powers sought to be exercised in the agreement to and execution of the contract with plaintiffs in error.

Not considering here the variances between the ordinances and the contract (above referred to), but assuming that the committee acted closely within the line of the powers with which they were entrusted in the agreement made by them with the plaintiffs in error, we argue that the ordinances delegated, or sought to delegate, to the committee a legislative discretion entrusted by the charter to the govern-

ing body, and that such effort to delegate such trust to a committee or to any one is void.

The power to "erect, establish, construct, regulate, and keep in repair sidewalks, &c.," is given in the charter to the city council. The precise mode in which this power shall be exercised is not prescribed by the statute. But the power is given to the council to be exercised by them as the legislative, governing body of the city. Its exercise involves important discretion. Probably no one subject-matter requires more intelligent and considerate legislative action.

The council seems to have been somewhat mindful of this. They decide in the ordinances hereinbefore referred to (except as before shown) the localities to be improved, make provision as to the mode of assessing by the city the costs of such improvements against the owners of the abutting property, select the curbing according to locality, declare that the pavements shall be of some one of several named materials, and authorize the committee to contract with responsible parties for the construction of the sidewalks.

There is no selection by the council of material for paving, no time indicated within which the work shall be completed, and no suggestion of limitation as to the price to be paid.

These matters herein entrusted to the committee are of the gravest character considering the vast extent of the contemplated work, and there is nowhere a suggestion that the obligations undertaken on behalf of the city by the committee should be submitted for consideration and approval to the council. The determination of the price to be paid was of especial consequence.

"The trust given to the council," say the court, "(in Thompson vs. Shermerhorn, 6 N. Y., 92,) was an important one, as the expenses of the improvements" (as in this case) "were, by statute, to be paid by the owners of the property in front of which they were made. It was in effect a power of taxation, * * * and nothing short of the most explicit language could justify the court in holding that the legislature intended to confer such a power on a city officer or a committee."

In these particulars the committee in this case perform no merely executive act.

It is not disputed but that the council could by ordinance have prescribed *all* the essential elements of the contract, and then (lawfully) ordered its execution by the committee.

Here, however, the committee are entrusted with absolute discretion as to time, terms, and price to be paid, and power to select of the several named materials for a pavement.

But the contract provides for payment in bonds of the city of Galveston.

The power asserted herein in the contract being drawn from section 8 of an ordinance of Aug. 19, 1873, which reads as follows:

> Sec. 8. "The mayor and chairman of the committee on streets and alleys shall provide for the sale, negotiation, and disposal of the bonds herein and hereby authorized to be issued and disposed of."
>
> *See printed record, pages* 17 *and* 18.

The ordinance provides for the issuance of such bonds to the extent of $250,000, but nowhere indicates the terms upon which they may be sold, and suggests no limitation of value, nor is there a suggestion that they may be negotiated except for money.

Supposing the council had authority to issue the bonds, it could have unquestionably authorized the committee, or any broker or auctioneer to sell them, had the price to be accepted, the amount to be sold at given times, and the terms of sale been previously fixed by the deliberative action of that body.

The authority involves the disposition of property of great value belonging to the city. The consideration for and terms upon which she shall be divested of it are matters of grave discretion.

The regulation of the price to be paid is a levy to that amount, of taxes, against the owners of the abutting property—the levy of a special tax by the committee.

The sale, or negotiation, of the bonds at their discretion as to amount is (as to such an amount) the levy of a general tax by the committee.

The fact that a special tax in the one instance and a general tax in the other had been determined upon in a general way by the council does not cure the difficulty, because the amount necessary to be levied is fixed by the committee alone.

In McKinney vs. Reed, 34 Iowa, 412, Judge Dillon, delivering the opinion of the court upon the power of a municipal corporation to delegate its taxing power, says:

"We have very carefully examined this subject in its various bearings, and think it best accordant with sound legal principles, and with sound public policy, to shut the door *in limine* upon a doctrine which, if pressed to its legitimate consequences, would lead to dangerous results, and which, if not thus adhered to, will be a useless anomaly in the law."

In The State, Danforth, prosecutor, vs. The City of Paterson, 34 New Jersey Law Rep., 163, the court decided: "That when the mayor and aldermen are authorized by statute to select a site for a public market, employ suitable architects, &c., that any effort to delegate the right of selection to a commission *is void*, although the statute authorized the council to appoint a commission with full powers to make all contracts and purchases and to transact and perform all business in relation thereto."

In Lyman vs. Jerome, 26 Wendell, 485, the court held that powers created by will or deed cannot be delegated, and *a fortiori* when created by statute.

That a city council cannot delegate any discretion given them by law is also settled in East St. Louis vs. Welhrung, 50 Ill., 48.

In Foss vs. Chicago, 56 Ill., 355, the court say:

"The statute places the responsibility of prescribing what improvements shall be made and the mode and extent of them in the council, and there is no authority for leaving

those matters to the discretion of the board of public works, and any effort to do so is void."

Chief Justice Shaw, in Day vs. Green, 4 Cushing, 438, says:

"By the organization of city governments in this commonwealth, aldermen are elected with a view to their judgment and experience—their knowledge of what is just to the individual and necessary to the public safety and convenience. When, therefore, such a power is granted to the mayor and aldermen, constituted as they are to act as one deliberative and administrative body, confidence is reposed in their united wisdom and experience in deciding both upon the fitness of granting a license, dependent on the local position, the width of the streets, the magnitude of the building, the season of the year, and all similar circumstances, and in prescribing the conditions necessary to the public safety and convenience," * * * and we think this rule "is well sustained by the authorities."

It will be observed upon examining this case that the act incorporating the city of Cambridge, which was the statute under consideration, grants authority to the city council to "make all such salutary and needful" "by-laws" "as towns have power to make."

Discussing the case at length, the chief justice concludes:

"The court are of opinion that the authority thus vested in the board, organized and acting together as an administrative body, could not be delegated by them to a single member, although the constitutional head of such board, to be exercised according to his views of expediency."

I refer, also, to—

Cooley Cons. Limitations, 204–5.
Thompson vs. Schermerhorn, 6 N. Y., 92.
Hydes vs. Joyse, 4 Bush, Ky., 464.
Smith vs. Moore, 2 Cal., 524.
11 Cushing, 433.
5 Cushing, 269.
12 Wheaton, 40–54.
Railroad Co. vs. Baltimore, 21st Maryland, 93.
Dillon Municipal Corporations, ch. 5, sec. 55.

4th. The petition, pages 3 and 4, printed record, is said to aver a ratification of the contract by the following recitation:

"That said notification by defendant to plaintiffs of its pretended annullment of said contract was not extended to or received by them until long after all said preparation for work had been made by said plaintiffs, and said expenses incurred and obligations assumed; nor until a committee of its council, appointed by a resolution thereof to inquire into and fully investigate said contract, long after the execution thereof, and the performance of labor thereunder, recognized the same by their report as an existing valid contract with defendant, and said report was adopted by defendant through its council, and said contract fully endorsed, approved, ratified, and confirmed as the act and deed of defendant; nor until, by its officers and agents, duly authorized, said contract was repeatedly recognized, ratified, and confirmed as valid and subsisting between plaintiffs and defendant."

Reference has already been made to the defective mode in which this pretended averment of ratification is made, both as to the failure to state the substantive fact of ratification and the suggestion that the council, being a legislative body, could not have empowered a committee to do anything creating a liability upon the city, except in the form of legislative action,—could not, therefore, confirm or ratify any act done by a committee in the premises, except such act of confirmation or ratification was also in the form of legislative action,—liability as upon implied contracts, under general law, having (as above shown) no application to matters of this kind.

The authorities upon this have been in part referred to.

There is, however, a firm confidence that a broad distinction exists in principle between the ratification of the act of an agent of a municipal corporation when the power to perform such an act (by an agent) may have been lawfully granted by the governing body, and the confirmation and ratification of an act done by such agent, when the governing body were incapable of lawfully creating an agency to do

the act in the first instance, because of inability to delegate legislative discretion.

In the first proposition the act of the agent is simply voidable. In the second the effort to create the agency is void.

Dillon's Municipal Corporations, § 385, contains the following text quoted by plaintiff:

"A municipal corporation may ratify the unauthorized acts and contracts of its agents or officers which are within the corporate powers, but not otherwise. Ratification may be inferred from acquiescence after knowledge of all the material facts, or from acts inconsistent with any other supposition. The same principle is applicable to corporations as to individuals."

It is believed that this is a rather broad statement of the law, and certainly the learned author does not mean to say that, because an individual may always by consent ratify any act previously done in any matter concerning his interest by another, that the same rule is equally applicable to the relationship between municipal corporations and their agents or strangers purporting to act in their behalf.

A municipal corporation is a body politic. Its charter, its organic law, its constitution, its council, a legislative and administrative body.—Agents, entrusted with special though large discretion, unable to delegate such discretion, and required to adhere in the exercise of it to a strict construction of the statute creating the corporation.

In respect to individuals, no (otherwise lawful) act could be performed relative to their interest that can properly be called void.

It is always possible for the individual, in reference to any matter subject to his lawful personal control, to ratify any act done by another within such limitation as to the subject-matter.

But the council of a municipal corporation is a political trustee. The depositary of public confidence, a legislative and administrative body, endowed with discretion as to all

matters under their control, when the line of action is not plainly indicated in the statute creating it, but enjoying the right and subject to all the responsibilities of such discretion. It is as impossible to delegate any part of it as to organize, of their own motion, a governing body to take their place, exercise all their rights, and perform all their duties.

The attempt by the council to empower a committee with the right to judge and decide any matter entrusted to it for consideration and disposition is absolutely void. It is impossible of ratification by them, because there must always be something to ratify. That which is void is nothing.

Governing bodies in political organizations must pursue the accepted and established forms of expressing their judgment upon all matters properly before them. They must act originally and not by way of confirming or adopting the acts of others, whether strangers or persons claiming to be agents. A departure from this rule in a single instance, if sustainable on principle, would involve a destruction of the theory upon which they are created—would be simply political revolution and the practical inauguration of a new law-making and law-administering power; the creature, not of the law, but of the will of a governing agency, acting in utter disregard of the powers and duties conferred upon it.

It is, therefore, believed that when the governing body of a municipal corporation attempts (as in this case) to delegate to a committee of its creation the disposition of any matter of public interest entrusted to the judgment and discretion of such governing body, such attempt is void.

That any action by such committee in the premises cannot bind the corporation, and that the governing body cannot ratify such act, because, 1st, that which is void cannot be the subject of confirmation and ratification; and, 2d, because the governing body of a municipality must, in all such matters, address their considerative judgment and discretion to the disposition in behalf of the public interest originally, and not by way of formal or informal adoption,

ratification, and confirmation of the previous determination of any other body.

The above suggestions have been submitted upon the hypothesis that the averment of ratification was properly made as a substantive fact, and that the fact of ratification had been attempted formally, and such attempt properly set out in the petition.

5th. But the committee in the contract make a provision—an essential, material, indispensable provision, if the contract be valid—which, it is submitted, the council could not have delegated the power to make to a committee and could not have made themselves in any mode whatsoever.

I refer to the condition precedent, to wit: "That said D. G. Hitchcock & Co. obtain the written consent of the owners of the property fronting or abutting upon the said sidewalks prior to the laying down of said pavements, (meaning asphalt,) which said written consent or selection of said pavement shall be filed in the mayor's office with the city clerk."

This must mean, under the most favorable construction, that the owner of the abutting property shall have the right to select the materials of which the pavement in front of his premises shall be constructed.

It would seem to have clearly been the purpose of the contract to concede this matter to the property-holder as to the pavement to be constructed in front of his premises.

The city owns the sidewalks. They are public property. The charter vests the whole subject, as to their construction, improvement, and regulation, in the discretion of the council or governing body.

They alone can determine when, where, and of what material they shall be constructed.

The council cannot, (it is respectfully submitted,) in any form of action, by ordinance or otherwise, delegate to the owner of the abutting property the discretion vested in them to be exercised in the general interest.

They can as reasonably delegate to him or to any one else the government of the city. It is in effect a delegation to each property-holder in the premises of the power of taxation and (in a measure) of general police.

By this delegation the city, through her agent, the council, parts with her right to determine the material of which the sidewalks shall be constructed or declines (so far as the ordinances or contract inform us) to construct any at all.

While these local improvments may be and are peculiarly advantgeous to those owning the abutting property, their construction is never for their convenience or accommodation alone; they are public highways, intended for the free and indiscriminate use of all persons, and in most instances not subject to the use of the owner in any greater extent than of any other person desiring to use them. It may benefit the owner of the adjacent property, but to benefit him is not the purpose of their construction. The cost is assessed against him because of the especial appreciation of his property by the increased facility of reaching or passing it. But the legislative or governing body never entertains the thought of having a sidewalk constructed for his personal accommodation. It should, and would (if guided by proper motives), construct the sidewalk as readily against his protest as upon his petition; therefore it would seem that any act of the council tending to yield any part of the general legislative discretion entrusted to them as the governing body of the whole city, no matter what the motive may be, is and ought to be void.

Upon the points herein suggested I conclude—

1st. That the committee acted in disregard of the ordinances in making the contract.

2d. That there is no sufficient averment of ratification in the petition.

3d. That the council endeavored to delegate to the committee a discretion vested in them by the charter of the

corporation, and that such attempt was void, and all action of the committee relative to the contract was void.

4th. That the council cannot ratify the action of a committee attempting to create a liability against the city by a contract originating in a void ordinance, and, therefore, a void contract.

5th. That the condition precedent in the contract, submitting the *selection* of the kind of pavement to the owners of the abutting property, is a provision the council itself could in no form of action have agreed to.

Respectfully submitted,

GEORGE FLOURNOY.

035 Rose
84 Penn St.
1 Wall
14 Ky
7 Ohio-
11 Rose
34 Lucas Co
Williams Co Ohio-
46 Ill
15 Ill Wall
19 Wall
87 Ind Lucas Co
43 Texas
42 Indiana
83 Ind
Jan 1876

No 153

DEXTER G. HITCHCOCK ET AL. v. THE CITY OF GALVESTON.

United States District Court, Eastern District of Texas, December Term, 1874.

Before Hon. WILLIAM D. WOODS, Circuit Judge.

WOODS, Circuit Judge.—The case as made by plaintiffs' petition is substantially as follows: On the 28th of February, 1874, the plaintiffs, as partners, entered into a contract in writing with the city of Galveston, by which they agreed for a compensation therein nomed, to fill, grade, tamp, roll, curb, and pave certain sidewalks in the city of Galveston. This contract was made in behalf of the city by the mayor and the chairman of the committee of the common council on streets and alleys, by virtue and in pursuance of certain ordinances of the city council. The plaintiffs, the petition avers, immediately after the execution of the contract, entered upon the performance of the work, and continued it, at great labor and expense, for forty days, when they were compelled by force and the power and authority of the defendant to desist from and abandon the work, and, although always ready and anxious to perform the said contract and complete said work, have ever since been wrongfully and willfully forbidden and prevented by the defendant from so doing. The work done by the plaintiffs at the contract price was worth $18,194, and the profits on the unfinished portion of the work, not including the paving, would have been $127,990.57. For the aggregate of these two sums, to wit, $146,184.57 and for $50,000 general damage, the plaintiffs ask judgment. The petition sets out, as exhibits, and as a part of itself, the contract in full and the several ordinances of the city council by authority of which it is claimed the contract was made. It is also averred, in an amended petition, that after its execution by the mayor and chairman of the streets and alleys committee, the contract was approved and ratified by the action of the city council.

It appears from the exhibits to the petition that by the contract upon which the suit is brought, the city of Galveston bound itself to pay to the plaintiffs, under the name of D. G. Hitchcock & Co., in the bonds of the city of Galveston, styled "Galveston City Bonds for Sidewalk Improvements," to be taken at par, a named rate for every square yard of pavement laid down by the plaintiffs upon certain sidewalks designated in the contract, said pavements to be composed of asphalt in bulk, rolled solid to the thickness of three inches; "provided, however, that the said D. G. Hitchcock & Co. obtain the written consent of the owners of the property fronting or abutting on said sidewalks to the laying down of the

said pavement, which written consent or selection of the said pavement shall be filed in the mayor's office with the city clerk." The contract further bound the city to pay to the plaintiffs in the same bonds, to be taken at par, a specified price for the filling necessary to be done preparatory to the laying of the pavement, under which term of "filling" was included grading, tamping, and rolling; also a specified price for the wooden curbing that might be needed or used in filling up and grading the said sidewalks preparatory to the putting down of pavement. The contract, after thus specifying the work to be done and the prices to be paid therefor, proceeds as follows: "In consideration of all the foregoing, the said D. G. Hitchcock & Co. bind themselves to lay down and fabricate the said pavement in the manner and style above set forth and stipulated; and they also bind themselves to fill, grade, tamp, roll, and curb the said sidewalks as above set forth and stipulated, and to receive in payment for all said work the respective prices above stated, and in the bonds of the city of Galveston, styled 'Galveston City Bonds for Sidewalk Improvements,' at par."

The charter of the city of Galveston is a public act of the legislature of Texas. In section 8 of article 3 of title IV, it is provided that the city council shall have power "to establish, erect, construct, regulate, and keep in repair, bridges, culverts, and sewers, *sidewalks*, and crossings. * * * The cost of construction of sidewalks shall be defrayed by the owners of the lot or part of lot or block fronting on the sidewalk, and the cost of any sidewalk constructed by the city shall be collected, if necessary, by the sale of the lot or part of lot or block on which it fronts, together with the cost of collection, in such manner as the city council may by ordinance provide, * * * and the balance of the proceeds of sale, after paying the amount due the city and costs of sale, shall be paid by the city to the owner." Section 2 of the same article and title declares that "the city council shall not borrow for general purposes more than $50,000." Section 3. That the city council shall have power "to appropriate money and provide for the payment of the debts and expenses of the city." Section 4. That the city council shall have power "to provide by ordinance special funds for special purposes, and to make the same disbursable only for the purpose for which the fund was created."

The ordinances set out in the petition as authority, by virtue of which the contract sued on was made, are two ordinances approved August 19, 1873; an ordinance approved October 21, 1873, and an ordinance approved February 3, 1874. The first ordinance (approved August 19, 1873), authorizes and directs the mayor and chairman of the committee on streets and alleys "to make a contract or contracts with proper and responsible parties to fill up, grade, and pave the sidewalks on both sides of the hereinafter named streets, and to curb the same, and for this purpose they are hereby directed to advertise for the period of thirty days for bids

or proposals to fill up, grade, pave, and curb, in part or in whole, the sidewalks herein named." The ordinance then proceeds to specify the sidewalks to be thus improved. Section 2 of this ordinance, as amended by section 1 of the ordinance of October 21, 1874, provides that "said sidewalks shall be paved with either of the following materials: Asphalt, hard bricks, laid in a bed of Portland cement and properly grouted; concrete, made of Portland cement, mixed with other proper materials; or with tiles or stone, laid in a bed of Portland cement; and the curbing around the same shall be made of the best hard brick and capped with a plank of heart pine, three inches in thickness and twelve inches wide, properly fastened to the curbing with the necessary iron bolts." Section 5 of the same ordinance provides that "the cost of filling, raising, curbing, and paving each separate sidewalk, as soon as the same shall be finished and completed, shall be a charge against the property abutting and fronting thereon, and shall be assessed against the same in the following manner." The section then declares how the cost of the work shall be assessed against the property, and that it shall be a lien thereon until paid. Section 6 provides that the assessment shall be paid in five annual installments, with interest.

On the same day that this ordinance was approved another was approved, which authorized the mayor to have printed or engraved coupon bonds of the city of Galveston to the amount of $250,000, to be styled "Galveston City Bonds for Sidewalk Improvements," to draw interest at ten per cent., and to be payable to the bearer in 15 years, provided that the city council should have the right to redeem at par any or all of said bonds at any time after five years from their sale or disposition. This ordinance also provided that the assessments made on property for the construction of sidewalks should, as they were collected, be appropriated to the payment of the interest on said bonds, and to form a sinking fund to pay the principal at their maturity or when redeemed. The ordinance of the 3d of February, 1874, provided that sidewalks on both sides of certain other streets therein named should be filled up, graded, curbed, and paved; and it then proceeds to direct "that the sidewalks shall be filled up to the grade established by the civil engineer, and curbed with cypress wood, stone or brick, and a pavement six feet in width laid in the center of the same—the said pavement to be composed of either asphalt, hard brick laid in Portland cement, or other proper materials, tiles or stone." This ordinance authorized the mayor and chairman of the streets and alleys committee "to make a contract or contracts with proper and responsible parties to fill up, grade, curb, and pave the said sidewalks," and directed that the cost of the work should be assessed against the owners of the lots in the same way as prescribed in the ordinance of August 19, 1873.

All these facts appear either from the petition of plaintiffs or from the charter of the city of Galveston, of which, being a public

act, the court takes judicial notice. The defendant alleges numerous grounds of demurrer, many of which I do not think well taken. As in my opinion some of the grounds of demurrer are well taken, it is not necessary in this opinion to notice particularly those which are overruled. The first ground of demurrer is the general one that the facts stated in the petition are not sufficient in law for the plaintiffs to have and maintain their action against the defendant.

I pass over the question whether the city council could delegate the authority to the mayor and chairman of the streets and alleys committee to make the contract in question. Let it be conceded that the power of these two officers was as full as the power of the city council itself to make the contract. The question meets us at the threshold of the plaintiffs' case. Have they made the necessary averments to entitle them to a recovery, conceding that the contract was a valid one and binding on the city of Galveston?

The ordinances by virtue of which the mayor and chairman of the committee acted are to be considered in giving construction to the contract. These officers act as the agents of the city, and the contract recites that it is made in accordance with the authority vested in them by the city council. It is to be presumed that the agents of the city made the contract in pursuance of the powers conferred upon them, and the plaintiffs, being bound to know the extent of the authority of the agents with whom they were contracting, made such a contract with them as they were authorized to make. (Story on Agency, sec. 73.) Both the ordinances which empower the mayor and chairman of the committee to contract, require them to enter into contracts with responsible parties "to fill up, grade, curb, and pave the sidewalks designated." It is clear to my mind that this is authority to contract for filling, grading, curbing, and paving, and not for filling and grading without curbing or paving. It was not necessary for the mayor and chairman to contract with the same party to do all the work. But they were required to contract to have all this work done by somebody. The mayor and chairman so construed their authority, and entered into the contract with the plaintiffs, by which the plaintiffs bound themselves "to lay down and fabricate the said pavement in the manner and style above set forth and stipulated;" and also "to fill, grade, tamp, roll, and curb the said sidewalks, as above set forth." The authority given to the city by its charter was to construct "sidewalks," the ordinances contemplated the construction of sidewalks, and the chief end and purpose of the contract was the construction of sidewalks. The filling, grading, and curbing were only the preparatory steps necessary to the completion of a sidewalk by the putting down of the pavement. The main purpose and the ultimate object was the pavements. No sane man supposes for a moment that the city council desired to raise a bank of sand in front of the lots of the citizens and leave it so, or that such was the purpose of the ordinance or the contract. If the city council had

not decided to complete the sidewalks by paving them, they would not have entered upon the work at all. So the contract was intended to provide for paving as well as filling, grading, and curbing, and did provide for it. It is clearly not the purpose of the contract that a part of the work should be done and not the residue. The plaintiffs agree to do the whole. The performance of a part only, without the consent of the city council, is no performance, and does not entitle the plaintiffs to a recovery. If there is a condition precedent to the performance of a part of the contract, and the contract is an entirety, that condition precedent must be performed or the whole contract fails.

Now, what does the contract provide? The plaintiffs agree to fill, grade, and curb, and to pave with asphalt. There is no covenant to pave with anything else. But the contract says, in effect, you shall not pave with asphalt unless you obtain the written consent of the owners of the property abutting on the sidewalks to the laying down of an asphalt pavement, which written consent or selection shall be filed in the mayor's office with the city clerk. Now, it seems to me clear that the obtaining of the consent is a condition precedent to be performed before any part of the contract is binding on the city. The plaintiffs agree to fill, grade, tamp, curb, etc., preparatory to the laying down of an asphalt pavement, and then to lay the asphalt pavement if the owners of the property will consent. It is not to be supposed that if they were prevented from completing a sidewalk, by the refusal of the property-holders to consent to an asphalt pavement, the contract authorizes them to do the work simply preparatory to the laying of a pavement, and then to leave it in that unfinished condition. How do we know but that the inducement to pay the price specified for grading, etc., was in the fact that the plaintiffs had agreed to lay the asphalt pavement for the specified price? The city of Galveston has agreed by this contract to pay $1.25 per cubic yard for the filling, grading, tamping, and rolling of a sidewalk, preparatory to the laying thereon of an asphalt pavement, and then to pay the price of $1.75 per square yard for the laying of an asphalt pavement. It has never agreed to pay the sum named for the work necessary to be done preparatory to the laying of any other than an asphalt pavement. This contract must be taken as a whole. The presumption is, that the price of one part of the work depends upon the price agreed upon for another part. The price allowed by the contract for the filling and grading and curbing may have afforded the plaintiffs a profit, while the price for paving would have afforded none, or even entailed a loss. That this is not mere conjecture is shown by the fact that the petition claims damages for the profit lost in the grading, etc., ranging from one to two hundred per cent., while it claims no loss of profit on the paving. Can the plaintiffs be allowed to pick out the profitable parts of the contract for performance and abandon the unprofitable? The

plaintiffs have agreed to do the whole. They can not do the whole according to the contract; they can not be in a position to perform in full, unless they have the consent of the property-holders, in writing, to the laying down of the particular pavement mentioned in the contract, and that consent is filed in the office of the mayor. They must perform the whole contract, and they can not, according to the terms of the contract, perform it without compliance with the conditions precedent. In other words, no part of the contract is binding on the city, unless the other party to the contract has first obtained the consent of the property-holders to the laying down of the pavement selected.

There is no averment in the petition that such consent has been obtained, and without such consent the petition is fatally defective. (Jennings v. Moss, 4 Texas, 452; Frazier v. Todd, Id., 461.) The demurrer must therefore be sustained, on the ground that the petition does not set out facts sufficient to entitle the plaintiffs to recover.

2. It is objected that the city council had no power, either through an agent or by its own ordinance, to make the contract sued on in this case. The contract contemplates the issue by the city of Galveston of bonds to the amount of $250,000, with ten per cent. interest, due in fifteen years, or redeemable, if the city so elects, after five years, to pay for work to be done under the contract. The contract can not be performed without the issue of the bonds provided for in the ordinance of August 19th, 1873. It is denied that the city of Galveston has power, either express or implied, to issue the bonds for the purposes named in the contract, and we think the demurrer to the petition fairly presents the question. I am unable to find any authority in the city charter, either express or clearly implied, to issue bonds or borrow money for the purpose of constructing sidewalks. To pay out bonds is, in effect, a selling of them, or a borrowing of money on them. (Rogers v. Burlington, 3 Wall., 666; Middleton v. Alleghany Co., 37 Penn. State, 241; Leybert v. Pittsburg, 1 Wall., 272.)

The clauses from the city charter already cited, and which are referred to by plaintiffs' counsel as containing the authority, do not confer any express authority to borrow money for other than general purposes, nor is the authority clearly implied. The power expressly given to appropriate money and to provide for the payment of debts and expenses of the city, to provide special funds for special purposes, to construct sidewalks, and to assess the cost of their construction upon the owners of the abutting lots, are powers usually found in city charters; but no fair intendment can be drawn from this of a power to issue bonds and borrow money upon them for special purposes. The reasonable construction, therefore, is, that money to pay debts and expenses and to provide special funds, is to be raised by the means for raising money expressly given by the charter, namely: by taxation or special

assessment, and not by the issue of bonds, which is only authorized for one special purpose. As these means are prescribed, any other means not expressly given, seem to be excluded. The power to borrow money and issue bonds not being expressly given by the charter, and not being clearly implied from any of its provisions, the question is presented whether the city of Galveston, or any other municipal corporation, has this power without legislative authority expressly given or clearly implied. It appears from the ordinance approved August 19, 1874, authorizing the issue of bonds in question, and which is an exhibit to the petition, that the bonds were to be coupon bonds, payable to bearer at a future day. Both the bonds and coupons, therefore, had all the qualities of commercial paper. (Mercer Co. v. Hackett, 1 Wall., 83; Myer v. Muscatine, 1 Wall., 384; Gelpke v. Dubuque, 1 Wall., 175; Moran v. Miami Co., 2 Black, 733.) The charter expressly declares in Title V, which is exclusively devoted to this subject, that the city council shall have power within the city, by ordinance, to annually levy and collect taxes, not exceeding one per cent., on the assessed value of all real and personal estate and property in the city, and provides for various other methods of taxation; and Title VI prescribes the method to be pursued for the collection of taxes. There is authority given by the charter to issue bonds; but that is for one special purpose, and that purpose is not the construction of sidewalks. See Title IX, Art. 1, Sec. 1, where the authority to issue said bonds is restricted to a single object, and carefully limited and restrained.

The question is, therefore, fairly presented, whether the city of Galveston was invested with implied power to borrow money for the construction of sidewalks, and issue therefor its negotiable bonds and coupons, payable to bearer and due at a future day.

Judge Dillon, in his work on Municipal Corporations, section 407, says: "Banking and trading corporations have implied or incidental power to make negotiable paper, and the same rule has, in some cases, been applied to municipal corporations. The ordinary warrants of such corporations, it is clear, do not cut off equities, and it is at least doubtful how far they have the implied power to make paper which shall have this effect. The adjudged cases on this point are conflicting." The learned author (section 406) says: "In the author's judgment, the better opinion is, that there is no implied power in the officers of a town, county, or city corporation, to issue warrants or orders which shall be free from equities in the hands of holders; that the existence of such a power is not necessary as an incident to those ordinarily granted, or to carry out the purposes of the corporation, and would be attended with abuse and fraught with danger.

These views are sustained by recent decisions of the Supreme Court of the United States. In the Police Jury v. Britton (15 Wall., 570) the court says: "We have, therefore, the question directly

presented in this case, whether the trustees or representative officers of a parish, county, or other local jurisdiction, invested with the usual powers of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, have an implied authority to issue negotiable securities, payable in future, of such character as to be unimpeachable in the hands of *bona fide* holders, for the purpose of raising money or funding a previous indebtedness." In answering this question the court says: "The power to issue such obligations and thus irretrievably to entail upon counties, parishes, and townships, a burden for which they have received no just compensation, opens the door to immense frauds on the part of petty officials and scheming speculators. It seems to us to be a power quite distinct from that of incurring indebtedness for improvements actually authorized and undertaken, the justness and validity of which was always to be enquired into. It is a power which ought not to be implied from the mere authority to make such improvements. It is one thing for county or parish trustees to incur obligations for work actually done in behalf of the county and parish and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable paper obligations, which may be multiplied to an indefinite extent. If it be once conceded that trustees or other local representatives of townships, counties and parishes, have the implied power to issue coupon bonds, payable at a future day, which may be valid and binding obligations in the hands of innocent purchasers, there will be no end to the frauds that will be perpetrated." And so the court held that the officers of a parish, county, or other local jurisdiction invested with the usual power of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, have an implied authority to issue negotiable securities payable in future, of such a character as to be unimpeachable in the hands of *bona fide* holders, for the purpose of raising money or funding a previous debt. The only difference between the case first cited and the case under consideration, is, that the former was the case of a parish in Louisiana and the latter the case of a city in Texas. The questions raised and decided in the case of the Police Jury v. Britton are identical in all other respects with those presented in this. I feel bound to follow this authority until overruled, because it is the judgment of the court of last resort, and also because I heartily approve it.

In a more recent case (The Mayor v. Ray, 19 Wall., 468), the same court held that neither the power to borrow money nor to issue commercial paper therefor belongs to a municipal corporation as an incident of its creation. To be possessed it must be conferred by legislation, either expressed or implied. This decision is made, it is true, by a divided court, but there is no dissent from the proposition decided in the case of The Police Jury v. Britton, *supra*. The point of difference between the judges seems to have been whether

certificates of debt, city warrants, orders, checks, drafts, and the like, used for giving to public creditors evidence for the amount of their claims, are, or are not commercial paper, so that the holder takes them free from legal and equitable defences, and with an absolute obligation on the part of the municipal corporation to pay them. But as I read the case there does not appear to be any dissent from the general proposition, unless it be by Mr. Justice Hunt, that a municipal corporation, with power of taxation given it for the purpose of raising means to carry on its functions, can not raise money by issuing or selling its coupon bonds due at a future day, and payable to bearer, without legislative authority expressly given or clearly implied.

These two decisions by the Supreme Court of the United States, are a law to this court which it follows with willing steps. A construction of the charters of municipal corporations, which without the express permission of the legislative power gives their officers the power to issue bonds, having all the qualities of commercial paper without limit as to amount or time of payment—gives an opportunity for the most stupendous frauds, and presents a temptation to their perpetration to a class of officials who, as the history of the country shows, are frequently rapacious and unscrupulous. One of the great evils of these times is the increase in the amount of the indebtedness of counties, towns and cities. The facilities which have been supposed to exist for the borrowing of money and the issuing of bonds by their local jurisdiction, have fostered extravagance, fraud and peculation, and loaded the people with burdens grievous to be borne. The result has been that the prosperity of cities has been destroyed, and the property of the inhabitants subjected to a public mortgage, in many cases equal in amount to the value of the property itself.

The assumption of authority by municipal corporations to issue bonds by virtue of their general corporate power is a recent one. It has always been denied by many courts of the highest respectability. In my judgment it should never have been admitted. So dangerous a power should be expressly and deliberately conferred, so that the tax-payer may be protected by prudent guards and limitations. Whenever the power to issue bonds may become necessary for the prosecution of some work or improvement, involving large cost, or for any other purpose, the power can be conferred by the legislature, with proper restrictions. But in my judgment no such authority ought to be implied from the general grant of corporate powers.

But it seems to me that provisions of the charter of the city of Galveston clearly exclude the power to issue bonds to pay for sidewalk improvements. The same section of the charter (Sec. 8, Art. 3, Title IV) which confers upon the city council the power to construct sidewalks, points out with minuteness and precision the manner by which the cost of their construction is to be defrayed. There

is no escape from the language, "the cost of construction of sidewalks shall be defrayed by the owners of the lot or part of lot or block fronting on the sikewalk," and "the cost of any sidewalk constructed by the city shall be collected, if necessary, by the sale of the lot on which it fronts." Here is a designation of the person who is to pay and of the manner by which payment is to be enforced. These provisions exclude any other method of payment. They clearly exclude the idea that the city may pay for such pavements by issuing its coupon bonds bearing ten per cent. interest, and payable to bearer in fifteen years. (The Mayor v. Ray, 19 Wall., 468.) It is no answer to this to say that the city may, nevertheless, enforce payment from the owners of the lots. Suppose the lots do not pay the cost of the sidewalks? The city, by its issue of bonds, has made itself liable and will have the deficiencies to meet. The city could not be made liable for these deficiencies if it had not assumed the liability by the issue of its bonds. (Lake v. Williamsburg, 4 Denio, 520; McCullough v. The Mayor of Brooklyn, 23 Wend., 458; Baldwin v. Oswego, 1 Abbott, 62; New Albany v. Sweeney, 13 Ind., 245.) The city undertakes to pay in the first instance for these sidewalks, and to take the risk of reimbursing itself from the property-owners. This is a clear departure from the authority conferred by the charter. "A corporation can act only in the manner prescribed by the act of incorporation which created it." (Head v. Insurance Company, 2 Cranch, 127.) The city can not assume a primary liability for these improvements. (Rock v. Mayor of Newark, 33 N. J. Law Rep., 131; City of New Albany v. Sweeney, 13 Ind., 245; McCullough v. Mayor of Brooklyn, 23 Wend., 458.)

The ordinance of August 19, 1873, which provides for the construction of the sidewalks, also declares that the cost of their construction shall be a charge against the property fronting thereon, and shall be assessed against the same. It then prescribes how the assessment shall be paid or its collection enforced. This, it seems to me, exhausts the power of the city council on this subject. It surely could not have been within the contemplation of the legislature that the city council, after taking these steps specially authorized by the charter, and amply sufficient for the payment of the cost of the sidewalks, should then prove that the city itself should assume the primary liability, advance the cost for the lot-owners, by an issue of its coupon bonds, payable to bearer in fifteen years.

My conclusions on this branch of the case may therefore be summed up as follows:

(1.) The power to borrow money and issue bonds for sidewalk improvements must be conferred upon the city council of Galveston before that body can assume to perform these acts.

(2.) This power is not inherent in a municipal corporation.

(3.) It is not expressly conferred by, nor can it clearly be implied from, any provision in the charter of Galveston.

(4.) The power is excluded by provisions found in the charter.

(*a.*)) By the provision for raising money by taxation for general and special purposes.

(*b.*) By the provision for issuing bonds, which is limited to a specific purpose, and that purpose not being sidewalk improvements.

(*c.*) By the provision that the cost of sidewalk improvement shall be borne by the owners of the abutting lots, and shall be collected by assessments on the abutting property.

In my judgment the assumption by the city council of authority to issue these bonds for sidewalk improvements, was not only unauthorized by the charter, but a clear and flagrant violation of its meaning and spirit.

The result of the views above expressed is:

1. That the plaintiffs have not by the pleadings shown a good cause of action against defendant, for want of an averment that they had performed the condition precedent, which was necessary to be averred in order to show a contract, which even if authorized, was binding upon the city; and,

2. That neither the city council of Galveston, nor any committee of its appointment, had authority to make the contract sued on. It is, therefore, absolutely null and void.

The demurrer to the petition of plaintiffs as amended is therefore sustained.

No. 153.

Supreme Court of the United States.

D. G. HITCHCOCK & CO.,
PLAINTIFFS IN ERROR,

VS.

THE CITY OF GALVESTON,
DEFENDANT IN ERROR.

ARGUMENT OF

S. S. HENKLE,

Of Counsel for Plaintiffs in Error,

DELIVERED IN THE SUPREME COURT ON DECEMBER 19, 1877.

PRINTED BY LEAVE OF THE COURT.

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1877.

IN THE SUPREME COURT OF THE UNITED STATES.

D. G. HITCHCOCK & CO., PLAINTIFFS,
vs.
THE CITY OF GALVESTON, DEFENDANT,
} IN ERROR.

Before entering upon the line of discussion which I had marked out for myself I will call attention to two or three statements and arguments made and three cases cited by Judge Ballinger on yesterday.

In the course of his argument my learned friend deduced from the provision of the charter which authorizes the issue of bonds to pay for the construction of ***two thoroughfares***, and the absence of any other express provision in the charter for the issue of bonds, that such power, except for the specified purpose, was presumed to be withheld; and in discussing this proposition, in connection with the clause of the charter limiting the borrowing capacity of the city to $50,000 for "general purposes," he gave the court a poetic description of the little city of Galveston lying by the seaside, and covering a league and labor of land, and he would have the court believe that for all the corporate wants or needs of the 25,000 inhabitants dwelling in primitive simplicity in this pastoral village $50,000 was the largest plenty, and that it never entered into the head of any one to exceed this limitation, or to issue bonds for any other purpose than for a small amount to pave two thoroughfares, and these only for a short distance, until the rapacious contractors had induced the city authorities to contract to issue $250,000 of bonds.

Now, I hold in my hand a public law of the State of Texas, entitled "An act to incorporate the city of Galveston, and to grant a new charter to said city, approved August 2, 1876, and I think the court must be amused by reading from page 39, as follows:

TITLE XI.

ARTICLE I—PROVISION FOR THE ISSUANCE OF BONDS, ETC.

SEC. 131. The said city shall have power to issue from time to time, as the City Council shall determine, bonds to the extent of eleven hundred and fifty thousand dollars, ($1,150,000,) of the denomination of one hundred dollars and multiples thereof, payable thirty years after date of their issue, bearing interest not to exceed eight per cent. per annum, payable semi-annually; but such bonds shall be used only in paying or redeeming legal and valid outstanding bonds, past due, falling due, or presented for exchange in discharging the legal and valid indebtedness of the city now existing for which bonds shall not have been heretofore issued, and in discharging any legal and valid indebtedness created under this act: *Provided*, That the bonds herein authorized shall not be issued at less than par for any of the above purposes.

ARTICLE II.

SEC. 132. That exclusive of such debt as may be authorized by act of the Legislature for the construction of a seawall or breakwater, and which shall be provided for by a special tax, the indebtedness of said city for all purposes, general as well as special, five years after the passage of this act shall not exceed twelve hundred thousand dollars, ($1,200,000;) nor shall such indebtedness ever thereafter exceed the amount of five per cent. of the value of the taxable property of the city, as shown by the regular assessment thereof for the purpose of taxation, &c.

Judge Ballinger declared in his oral argument that the law of Texas for forty years has been in the line of the very strictest construction of municipal powers. He cites but one case to sustain this statement, Williams vs. Davidson, 43 Texas.

The case bears no such construction.

It was a suit by a citizen of the town of Victoria to enjoin the defendant from exacting toll for passing over a bridge connecting with the town. Defense was that defendant had a contract with the town authorizing the maintenance of the bridge. This contract conferred the privilege claimed by the defendant and allowed its exercise for twenty years. Besides it bound the city to stop all other entrances to the town across the river except by this bridge.

The court below granted the injunction; defendant appealed. The Supreme Court declared that the contract was *ultra vires* because: First, it assumed the power of the corporation to grant a high governmental privilege; and no such power was conferred by the charter. Second, it was a contract of partnership made by the town for purposes of profit, as if it were a trading corporation.

The case however was reversed and remanded, with instructions that the city be made a party on another trial in order that defendant might recover from it such damages as he had suffered in consequence of proceeding under the contract.

The case is authority against the defendant in error.

We have by reasonable diligence been unable to find any authority for the Judge's statement either in the statutes or reports of the State, and as he cites but one case and that one in our favor rather than his, we conclude that the State of Texas in imitation of the Roman emperor, must have posted its laws so high that they cannot be read by the citizens.

We have seen the theory of strict construction which obtained in Galveston.

Judge Ballinger was asked by Mr. Justice Clifford, if in case the lots abutting upon the sidewalks should not realize upon sale enough to pay the assessments, whether the city would be liable for the deficit? and he replied that it had

been decided that it would not. He referred to the case cited in his brief, from 13 Ind., where the law expressly provided that the city should not be liable, and gave the contractor the right to sell, himself; he had sold a lot which did not pay the assessment; he thereupon sued the city for the deficit, and the court properly held that the city was not liable.

He also referred to a case in 33 New Jersey, where the law authorized the assessments for benefits to be offset by special damages sustained. The court held that there was no liability on the part of the city for damages, as they could be offset by benefits only.

I will now proceed to the discussion of the questions which in my judgment should control the decision of the case.

The court below decided that the contract was *entire*.

When is a contract severable?

See 2 Pars., 517., 6th Ed.
Hallis vs. Chapman, 36 Texas, 2.

The contract—several divisions:

1st. *Paving.* This is provisional; there were five several contracts with as many different persons, for as many different kinds of pavement used, each contained the same proviso. But this was the only contract which embraced any other work than the paving.

If the property holders decided for asphalt, then Hitchcock & Co. were to do the paving; if they decided for brick, the brick contractor was to do the paving; if stone, the contractor for stone was to do it; if cement, then the contract or for cement was to do the paving.

Hitchcock's bids had been accepted not only for the asphalt pavement, but for the filling and wooden curbing, and these two items were bid for separately, and Hitchcock being declared the lowest bidder the contract for both

of these branches of the work were awarded to him, and in different sections, they were all embodied in his written contract. The filling might have been awarded to some one else, and so the curbing to yet another, but they were all awarded to Hitchcock because he was the lowest bidder.

The filling and curbing were to prepare the work for the laying of the pavement, which should be decided upon by the lot owners, and if they failed to decide, by the city officers. Hence the second part of the contract provided for the filling which needed to be done "preparatory to the laying of *any pavement*;" and so the third part of the contract provides for the wooden curbing "that may be needed or used in filling up and grading the said sidewalks preparatory to the putting down of the said pavement *or any other*," and for each branch of the work there is a separate and distinct price, and neither having any necessary relation with the other or with either of the others. But the sidewalks were to be completed and not left in sand heaps, either entirely by Hitchcock & Co. or partly by Hitchcock & Co. and partly by some other contractor or contractors. So much for the "entirety" of the contracts.

The *proviso* follows immediately after the contract for the *pavement*, and is in its terms confined to it, and has no relation whatever to the parts of the contract which stipulated for the *preparation* of the work for the laying of "*any pavement*."

The obtaining of consent of the property owners along the lines of these sidewalks was at best doubtful and to be necessarily the work of time; and yet the plaintiffs, under the direction of the city authorities, without the loss of a day, commenced the work of filling and curbing. Would they have done so if they had understood that the obtaining of consent of the property owners to the laying of an asphalt pavement was a condition precedent to the right to enter

upon the performance of this part of the contract? and would the city authorities have directed or permitted them to do so if they had so understood it?

This shows the interpretation given by the parties of this *proviso* at the time the contract was made or immediately after.

But it is said the city had no power to issue bonds, and the contract is therefore *void*.

Where the power to do a work is given the power to pay for it is necessarily implied. The power to pay implies the power to contract a debt. And the power to contract a debt implies the power to evidence the indebtedness by any usual form of obligation which may be agreed upon by the parties.

The power of a municipal corporation to give written evidences of indebtedness has never been denied except where there is an *express* inhibition upon it.

In the Police Jury case the court say that certain *quasi* corporations if restricted and specific powers, have not the power to issue paper, *which shall be unimpeachable in the hands of bone fide holders without notice.* This is the extent to which the case went; and the power to issue paper for indebtedness created in making authorized improvements is expressly maintained. Say the court, "it is one thing for a county or parish to give paper vouchers for work actually done, and a totally different thing to issue *unimpeachable paper obligations to an indefinite extent.*"

In the later case of Mayor vs. Ray, the opinion is expressed by Judge Bradley, representing a minority of the court, that municipal corporations have no implied power to borrow money; but it is conceded by Judge Bradley that they may give evidences of indebtedness in anticipation of taxes. How far may taxes be anticipated? If to be anticipated at all, who must judge of the term of antic-

ipation? Is it a corporate or a judidicial discretion? But he held that it is an abuse of the true character of these documents to give them the character of commercial paper so as to preclude all inquiry into the equities in their creation. Judge Hunt held it to be a power incidental to corporate life to borrow money for the legitimate uses of the corporation, and that it may issue its *notes* unless inhibited.

The extreme view then expressed by any member of this court is simply that municipal corporations may not issue commercial paper which will shut out equities in the hands of innocent holders.

While with the utmost defference we would have arrived at a different conclusion; yet we might safely concede this to be the law for the purposes of this case.

The court below held the contract to be *void* because the contractor agreed to take negotiable bonds, at par, in payment.

Now, I submit that if the law is that bonds may be given for a work authorized to be done, the fact that on their face they were to be payable to bearer, would not make them void, but would, upon the doctirne of Judge Bradley, make them subject to equities in the hands of innocent holders. And when any bond shall be sued on, if the city had a good defence, it could make it, that is all.

But suppose I am mistaken in this, and the bonds are *absolutely void*, because the city had no power to issue them, does that make the contract void? Certainly not if the corporation have power to contract for the performance of the work and to contract the debt, the fact that it promises to pay in the form of an obligation, that it has no power to issue, effects the contract only *pro tanto.* The *written obligation* may be *void* but the *contract will stand.*

State Bank of Indiana vs. Leavitt, Receiver, 14 New York, 162, Rec. on p. 191.

Leavitt, Receiver vs. Curtis, Graham, et al, 15 N. Y., 9, say the court, "the right to give a note or other engagement to pay a debt is so nearly identical or so inseparably connected with the right to *contract* the debt, that no doubt upon the question ought to be admitted. The doctrine is sustained by reason and authority, pp. 66, 67, 94, 95, 96, 97, 98. "Although they had no power to contract to issue *bonds*, yet this does not avoid the *contract*, and suit may be maintained on the *contract* for *money*. If the corporation mistakes its power to issue the kind of evidence of indebtedness for which it engages, the innocent party is not to be prejudiced by its mistake or fraud."

The Oneida Bank vs. The Ontario Bank, 21 N. Y., at p. 495, the court say substantially that contracts prohibited are void; "but there is another principle more beneficial, that one shall not set up his own illegality to the prejudice of an innocent person. *He can* set it up when the legislative power not only *forbids* to make the contract, but declares it to be *void*. But the *logic* of the law, and *certainly its morality*, are not opposed to the doctrine, that the legislature may prohibit the contract and punish the guilty parties, and yet leave the contract to stand in favor of innocent persons not included in the terms of the prohibition."

"The legislature seems to have intended to punish banks for making certain description of contracts, but not to enable them to take advantage of their own wrong by repudiating their own obligations."

The court, on p. 496, proceeds to reason, that the inhibition was upon the *bond*, and that if the contract is *void* the other party can recover for money advanced. And on p. 497, they say, "the loans themselves were lawful contracts, and I see no reason why they cannot stand according to their terms and intentions, rejecting only the assurances given for the repayment as simply worthless."

Argente vs. San Francisco, 16 Cal. 256, was a suit against the city upon the quantum meruit, upon a contract and upon warrants issued by the corporation payable out of a certain fund. The court held the contract good but the warrants bad and void. Judge Field at p. 276, says, "the warrants by themselves furnish no ground of recovery; they are neither bills of exchange nor promisory notes; they are drawn against a particular fund and are not payable absolutely, but only in case the designated fund is sufficient to meet them;" "the warrants therefore, must be laid out of consideration in determining the case, and the right of the plaintiff to recover must turn upon the sufficiency of the claim arising from the alleged contracts with the city, or for the money alleged to have been received by the city for his use."

Maher vs. Chicago, 38 Ill., at 473, the court say, "if a municipal corporation in dealing with an individual assumes that it possesses certain corporate powers upon which the validity of its acts depends, and it turns out that it does not possess the specific powers relied on, it ***is not thereby excused from the performance of its obligations,*** if they can be performed through the agency of other powers that it does possess. Here was a recognized debt. It was expected by all parties that it would be paid out of a particular fund, which the debtor undertook to raise. He has failed in this, but the debt remains, and the debtor having other property equally liable for its payment, must discharge it from that property."

Chicago vs. The People ex. rel. 48 Ill., at p. 418, the court say, "the counsel for appellees quote the case of Maher vs. Chicago, 38 Ill., 266, where there was a similar permission in the contract, and we nevertheless gave judgment against the city. But that case was upon the ground that a special assessment could not be levied, and we held the city could not be permitted to procure the work to be done on the faith of a special assessment, and then avoid payment by setting

up that it had no power to levy it. If it could not do what it had undertaken to do, it was bound to compensate the injured party."

I think all the cases cited where the question as to the power to issue bonds is discussed, are suits to collect bonds or to compel the issue of bonds.

I have discussed these questions relating to the bonds as though they were really in the case, because the court below based its adverse decision partly upon the ground that the corporation had no power to issue the bonds stipulated for in the contract, and because the learned gentlemen on the other side rely upon this point; but it seems to me that it is not a question in the case at all. No bonds have in fact been issued; this is not a suit to recover upon bonds, and the validity of bonds is in no necessary way involved in the case. This is a suit to recover for work and labor and material furnished under a contract, and for damages for preventing the full performance of the contract on the part of the plaintiff. We are not asking for bonds nor for the specific execution of the contract, but are trying to recover pay for what work we have done for the defendant, and damages because it would not allow us to fulfill our contract, and how does it become material whether the corporation had power to issue bonds or not? The question is whether the corporation had power to contract for the work, and to pay for it. If it mistook its power to issue bonds no harm has been done it by reason of its mistake. The bonds are not in the hands of innocent holders who are seeking recovery upon them and disputing the right of the corporation to set up equities against them. If you have no power to issue bonds pray don't do it. We don't want your worthless paper. But you made a contract with us, upon the faith of which you got our labor and material, and you put us to great expense and trouble in preparing to execute the contract, relying upon

your *bona fides*, and after getting a large amount of our work which you are now enjoying, and getting us involved in obligations which will be utterly ruinous to us if we fail in this action, you coolly forbid us to go on with the work and refuse to pay for what we have done, because you have discovered that you have no power to issue bonds.

The bonds were not a vital part of the contract, but only evidence of indebtedness.

Had the city power to contract to construct sidewalks and to pay for them primarily?

The charter confers the general power to contract. It gives the power to establish, erect, construct, regulate, and keep in repair sidewalks, confers the power to pass, publish, amend or repeal all ordinances rules, and police regulations not contrary to the constitution of the State, for the good government, peace, and order of the city, and the trade and commerce thereof, that may be necessary or proper to carry into effect the powers vested by this act in the corporation, the city government, or any other department or officer thereof.

It contemplates the erection of sidewalks either by the owners of the lots, under the direction of the city, or by the city itself, and in either case the cost is to be defrayed by the owner. In case it is done by the owner he does it himself and of course is primarily liable; but where it is done *by the city* the cost may be collected, if necessary, by the sale of the lot in such manner as *the council may provide*, and after paying *the amount due the city* and the cost of sale, the balance, if any, *shall be paid by the city to the owner*."

Art. 3, sec. 8, p. 28, charter. See also sec. 14, p. 29.

The ordinances which authorized these sidewalks provided for both cases, sidewalks to be constructed by the owners of the lots and sidewalks to be constructed by the city, and in the latter case they provided how the city should be reimbursed for the cost by the owners of the lots. The cost was

to be assessed upon the lots and be a lien from the completion of the sidewalk. The contract with the plaintiffs was for sidewalks *to be constructed by the city*, and the charter contemplated that the city should pay or assume the liability to the contractor and reimburse itself by assessments upon, and, if necessary, by sale of the lots.

It might have been competent under the charter for the council to have provided in the contract that the contractor should collect directly from the lot-owners, and should not look to the city for payment; but it *did not*, and clearly it had the power under this provision of the charter to assume the primary liability to the contractor, and look to the lots or lot-owners to be reimbursed.

The cases cited by the defendant's counsel are all cases in which either the charter or act of the legislature, or ordinances, or the contract itself provided that the contractor should look primarily to the lot-owners or to the lots for payment. In some there is the express stipulation that the city shall not be liable in any event; in others that the contractors should themselves collect the assessments; and in others that the contractors should not be entitled to demand pay from the city until the money had been realized from the assessments.

I think it would be safe to say that every one of the cases relied upon would fall within the one or the other of these classifications.

But it has nowhere been held that in the absence of an *express limitation* upon the power of the city to contract to pay primarily, that it might not so do.

Allen vs. City of Gainesville, 35 Wis., pp. 408-9.
Forltz vs. Cincinnati, 2 Handy, 261.
Sleeper vs. Bullen, 6 Kan., 300.
Mather vs. Chicago, 38 Ill., 266.
Chicago vs. The People, 48 Ill., 416.
Louisville vs. Hyatt, 5 B. Men. 199.

Keaney vs. City of Covington, 1 Met. (Ky.), 339.
Swift vs. Williamson, 24 Barb,, 427.

Certainly there is no express limitation in the charter upon the city of Galveston to contract to pay primarily, on the contrary the language of the charter implies that where the sidewalk is constructed *by the city, the city is to primarily pay* and look to the lots for reimbursement.

But suppose the charter does contemplate that the cost shall be paid *primarily* by the lot-owners, that is not a *limitation* upon the power of the city to assume the primary liability. The city is charged with the construction of sidewalks, and it is its duty to make them, if the lot-owners do not do it, when ordered by the city. Now suppose no one is willing to contract to make the walks and look to the lot-owners, will any one say that the power must remain dormant? Or may the city do it and collect from the lot-owners by sale of the lots, if necessary to reimburse itself the expense? It is a matter of discretion with the council to contract to pay primarily, or to contract that no money shall be paid until it is realized from the assessments.

Same authorities as last cited.

In most of the cases cited by the defendants the law of the corporation provided that the improvements should be petitioned for by a majority or sometimes two-thirds of the lot-owners upon the line of the improvement, and if one-third did not remonstrate the work should be done and the cost paid by the lot-owners; and in some cases the law provides that the city shall not be liable.

In some of these cases it has been held that the city could not be sued upon the contract, because it was acting as the mere agent of the lot-owners to make and collect

the assessments and pay over to the contractors as in Lucas vs. San Francisco, 7 Cal.

But in *none* of these cases did the city contract to pay in any other way than as the law directed.

But where the city has stipulated that these contractors shall not look to it for payment until the money has been collected from the assessments, the cases are numerous, and in many different courts and States, and I believe are very nearly, if not entirely, uniform in holding, that the city may be sued if she fails or refuses to make the assessments and collections with reasonable diligence and pay over to the contractor.

Baldwin vs. Oswego, 1 Abbott, Court of Appeals, 62.

Canning vs. Brooklyn, 11 Paige, 596.

Judge Porter in Abbott case reviews the New York cases cited on either side. Maurice vs. New York, 45 Selden, 120.

Allen vs. City of Gainesville, 35 Wis., 403.

Forltz vs. Cincinnati, 2 Handy, 261.

Slaper vs. Bullen, 6 Kan., 300.

Louisville vs. Hyatt, 5 B. Minn., 199.

Keany vs. Covington, 1 Met. (Ky.), 559.

Swift vs. Williamsburg, 24 Barb., 427.

Or if the city has mistaken or misconstrued its powers to assess the cost of special improvements upon the adjoining property and has contracted for such improvements to be paid for *out of such assessments*, the courts have held that the city shall be liable to the contractor, as in the cases of Maher vs. Chicago, 38 Ill.

It has been repeatedly held that when the city has contracted to pay for improvements which by the charter or ordinances are required to be paid for by the lot owners, *if*

there be no expresss inhibition upon the city to so contract, the contract is valid and binding upon the city.

Vide Cummings vs. Brooklyn, 11 Paige, 596.

The chancellor says, "The 40th section of the charter gives general authority to the common council to cause streets to be graded, paved, &c.," and there is nothing in the charter which prohibits the corporation from entering into general contracts for the making of such improvements. It is true the same section of the charter which authorizes these improvements to be made directs the expense thereof to be assessed upon the owners and occupants of the lands and premises benefitted thereby in proportion to the amount of such benefits. And as the amount of funds which the corporation is annually authorized to raise for general purposes is limited by law, it is a precedent precaution in making contracts for grading and improving streets, &c., to regulate the mode of payment in such manner as to give a reasonable time to assess and collect the amount from the property benefitted, before the payment for the labor shall be demandable from the corporation. The assessment of the expense as a local tax is not, however, a restriction upon the power of the corporation, so as to require it to contract only for payment out of the particular fund. But this local tax is a fund which has been provided by the legislature to reimburse the corporation for the expenses of an improvement which it has either paid, or become liable to pay, &c."

In the case of Baldwin vs. Oswego, 1 Abbott, Court of Appeals, 62, the case of Cummings vs. Brooklyn is cited and said to be the settled law of New York.

Allen vs. Gainesville, 35 Wis., 403.

The Argente case, 16 Cal.

It is argued that the city could only lawfully contract to levy the assessments, and it then became the duty of the plaintiffs to collect from the lot owners. Let us see where the argument would lead. I think I have conclusively shown

that the mistake of the city as to its power to issue bonds, would not avoid the contract except to that extent, and if the law is that the plaintiffs must look to the lot-owners for pay, the plaintiffs would have the right to do the work and resort to the lot owners for pay, certainly in equity, if not at law upon this contract. But the liability, of the lot owners did not arise under the ordinances until the sidewalks were *completed*, and the sidewalks were not completed because the defendant, with force and arms, prevented the plaintiffs from completing it, or their part of it. And if the city is liable for *negligence* or *innocent mistakes* in making or collecting the assessments *a fortiori*, would it be liable for injury which results from its wrongful acts?

But the charter provides that the city council shall not borrow for *general* purposes more than $50,000, and it is claimed that the power to contract for sidewalks by the city was in subordination to this limitation.

I will not stop to discuss what the legislature meant to import by the terms "general purposes" in this clause of the charter.

The next clause of the charter makes it the duty of the council "to appropriate money and to provide for the payment of expenses of the city."

Now, suppose the city has borrowed $50,000 and her treasury is empty, yet the law of her being demands of her the discharge of certain duties, as the removal of obstructions from the bay and channel, the preservation of the navigation thereof; to prevent the introduction of contagious diseases; to provide the city with water for the extinguishment of fires and for the convenience of the inhabitants; to provide bridges, to provide for lighting the streets, to establish and erect market-houses; to provide for cemeteries, and to erect hospitals.

It will be conceded, I apprehend, that all these things are not only *desirable*, but most of them absolutely necessary,

and yet they can't be provided without the use of money or credit. Will my friends tell me that you must wait before incurring further debt until the legislature authorizes a further borrowing, or until money is collected from taxes? Meantime the city may burn down for want of water, or a contagious disease may decimate the inhabitants. No, the legislature contemplated no such absurdity as this. The provision is a prudent ***direction*** but not a ***limitation upon power.***

Cummings vs. Brooklyn, 11 Paige, 596.
Baldwin vs. Oswego, 1 Abbott, 62.
Allen vs. Ganesville, 35 Wis., 403.
Argente vs. San Francisco, 16 Cal.

The next section 4, of title 4, is "to provide, by ordinance, special funds for special purposes, and to make the same disbursable only for the purposes for which the fund was created; and any officer misappropriating said special funds shall be deemed guilty of malfeasance in office, and shall, on complaint of any one interested in said funds so misappropriated, be removed from office and be incapable thereafter to hold any office in said city, and shall, on conviction be fined and imprisoned, &c."

Now, what is a "*special* purpose?" If it is determined to build a market-house, a special tax may be levied for that specific purpose, or the city may issue market-house bonds and sell them, and set aside the proceeds for that particular purpose, and it becomes a "special fund" for a "special purpose." And so special funds may be raised to purchase cemeteries, or to construct sewers, or any other of the works that the city is bound to provide; and what is more common than for cities to provide these "special funds" for "special purposes?" Has not almost every city had its "sewer bonds," and "water bonds," and "city hall bonds," &c.?

The learned counsel argue that because the construction of

sidewalks is among the enumerated *general* powers of the city council, that therefore it cannot properly be predicated of a fund raised specifically for that purpose, that it is a "special fund" for a "special purpose." Then, where, pray, do you find a *special* purpose? For this enumeration comprehends *all* the purposes for which the council may appropriate money. One of the learned counsel in his brief meets this objection by saying "not that there are 'general' or 'special' 'purposes' of city government; but for any purpose of the city government deemed of adequate importance, the council has the discretion and power to provide by ordinance that it will set a part acertain precentage, or a certain aggregate amount of its funds, and secure its application to the purpose. It then becomes a "special fund" for a "special purpose."

If this be so, then after the $50,000 has been borrowed, the city cannot provide for water, for sewers, for gas, or any other necessary thing unless it can be provided for out of the fund raised by the levy of one per cent. of taxes. This is not and cannot be so. No considerable city in the country could be run upon such a strict construction of its powers.

The ordinances which provide for these sidewalks, provide a "special fund" to pay for them by levying the cost upon the lots abutting upon the improvement, and that the money collected from these assessments shall constitute a "special fund" to pay the bonds, and that any one misappropriating this fund shall incur the penalty provided for in sec. 4, of art. 4, of the charter.

It is only because this is a "special purpose" that this "special" levy or assessment can be justified. It is presumed that the owner of property along the line of the sidewalks are specially benefitted, and for this special benefit they shall specially pay, and the fund thus raised cannot be

used for any other purpose, or for the general purposes of the city. If this be not a special purpose then whence the propriety or right to collect the cost from particular persons and in a particular way, instead of paying for it out of the general fund collected from taxes levied upon all the citizens alike.

The system contemplated by the charter was that the city council might *require* the lot-owners to *construct* sidewalks, the cost to be *defrayed* by themselves, and for this the city did not contract with any one, and assumed no obligation to any one; but the lot-owners were, under the direction of the city council, to do their own work and pay for it. And also that the city might construct sidewalks itself and levy and collect the cost upon the lot-owners in such manner as the city council might, by ordinance, provide; if necessary they might sell the lots and "after paying the amount due the city, the balance of the proceeds of the sale shall be paid by the city to the owner."

If the contractors were to look primarily to the owners of the lots for their pay, what is meant by the phraseology "after paying the amount due the city," and "the balance of the proceeds of the sale shall be paid by the city to the owner."

The system provided by the ordinances and the contract was in exact conformity, it seems to me, to the spirit and the letter of the charter. Said Judge Field, in the case of Argente against San Francisco, in 16 Cal., in construing ordinances, and a contract which contained provisions similar to these, "I am of the opinion that the city is primarily liable, and that she and not the contractors must look to the property or the property-holders for meeting the necessary expenses, and for various reasons. These improvements are to be made by the city and the contracts are with the city. To the contracts there are two parties, the

parties bidding and the party accepting. The property holders are not parties to the contract. There is no priority between them and the contractors, or between the property and the contractors. The city is to levy the assessment and enforce the payment; over her acts the contractors can have no control, and her acts cannot properly enter into any consideration with them. They cannot assert any claim against the property or its holders. They must look alone to the city. They do not possess any lien even upon the property. It is the duty of the city by her government to make the assessment and collect the same, and the contractors are mere strangers to the proceedings, as much so as any officer of the State who draws a salary is to any proceeding to enforce the revenue laws. The clause in the ordinance constitutes only a designation of the source upon which the city intends to rely to pay for the improvements, and subserves the double purpose of notifying the lot owners of what they may exexpect in case they interpose no protest to the improvements, and of imparting assurance to the contractors of obtaining payment for their work independent of any question as to the amount of her general indebtedness."

The new charter of 1876 provides, "that the city shall not borrow for general or special purposes more than $50,000 in any one year," p. 14, art. 3, sec. 28.

The old charter provided that the city should not borrow at all more than $50,000 for "general purposes."

But now "special purposes" are added, and the city may borrow $50,000 annually. Showing that when the legislature deemed it wise to put a limit upon the borrowing for "special purposes" they found it necessary to increase the borrowing capacity of the city from $50,000, absolutely, to $50,000, annually.